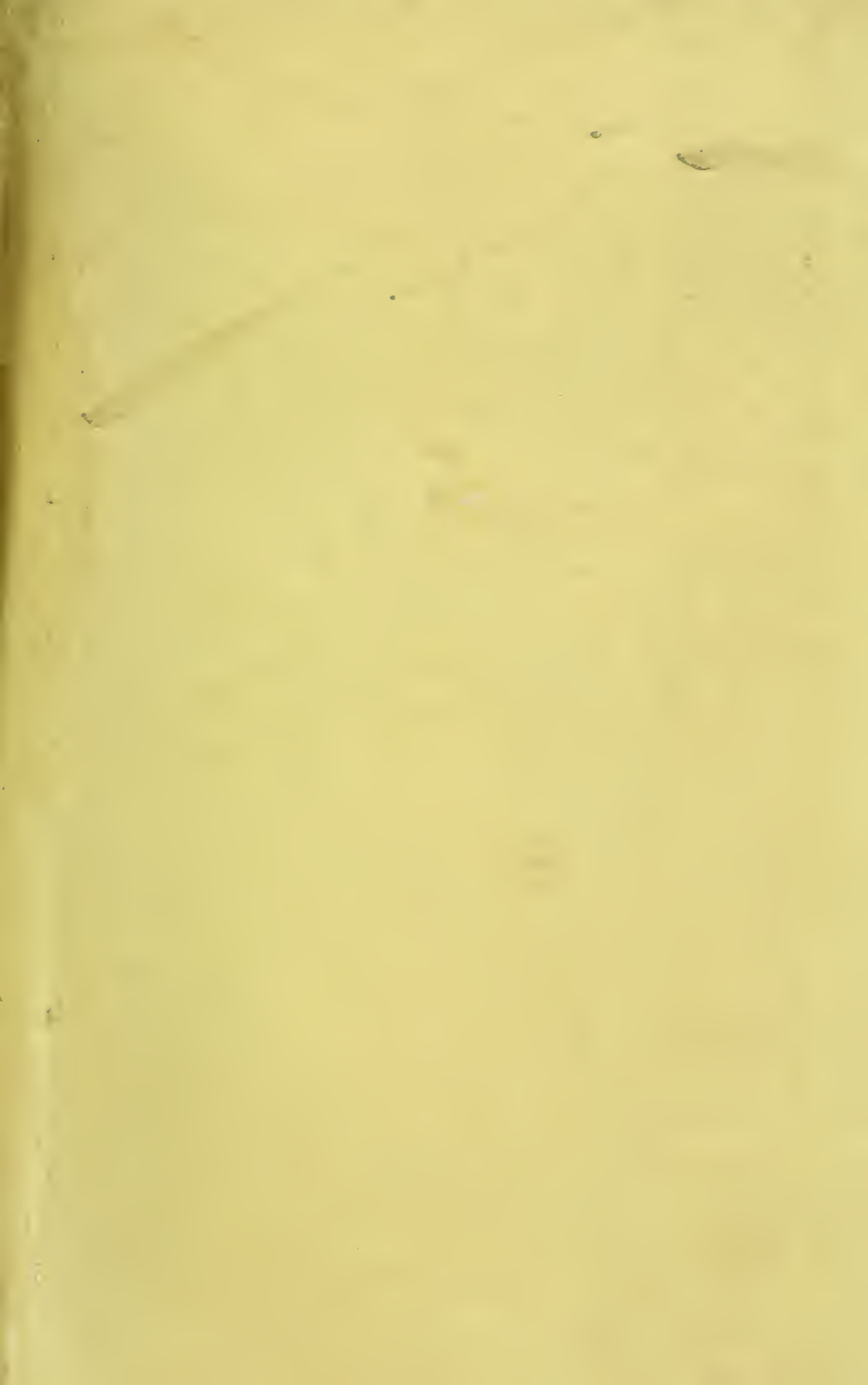




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RUBRIC OF THE COMMON LAW.

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A RUBRIC

OF

THE COMMON LAW,

BEING

A SHORT DIGEST OF THE COMMON LAW,

Illustrated throughout by Leading Cases;

WITH

AN APPENDIX AND VERY COPIOUS INDEXES.

BY

CHARLES GEORGE WALPOLE, M.A..

Of the Inner Temple, Barrister at-Law.



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TO THE

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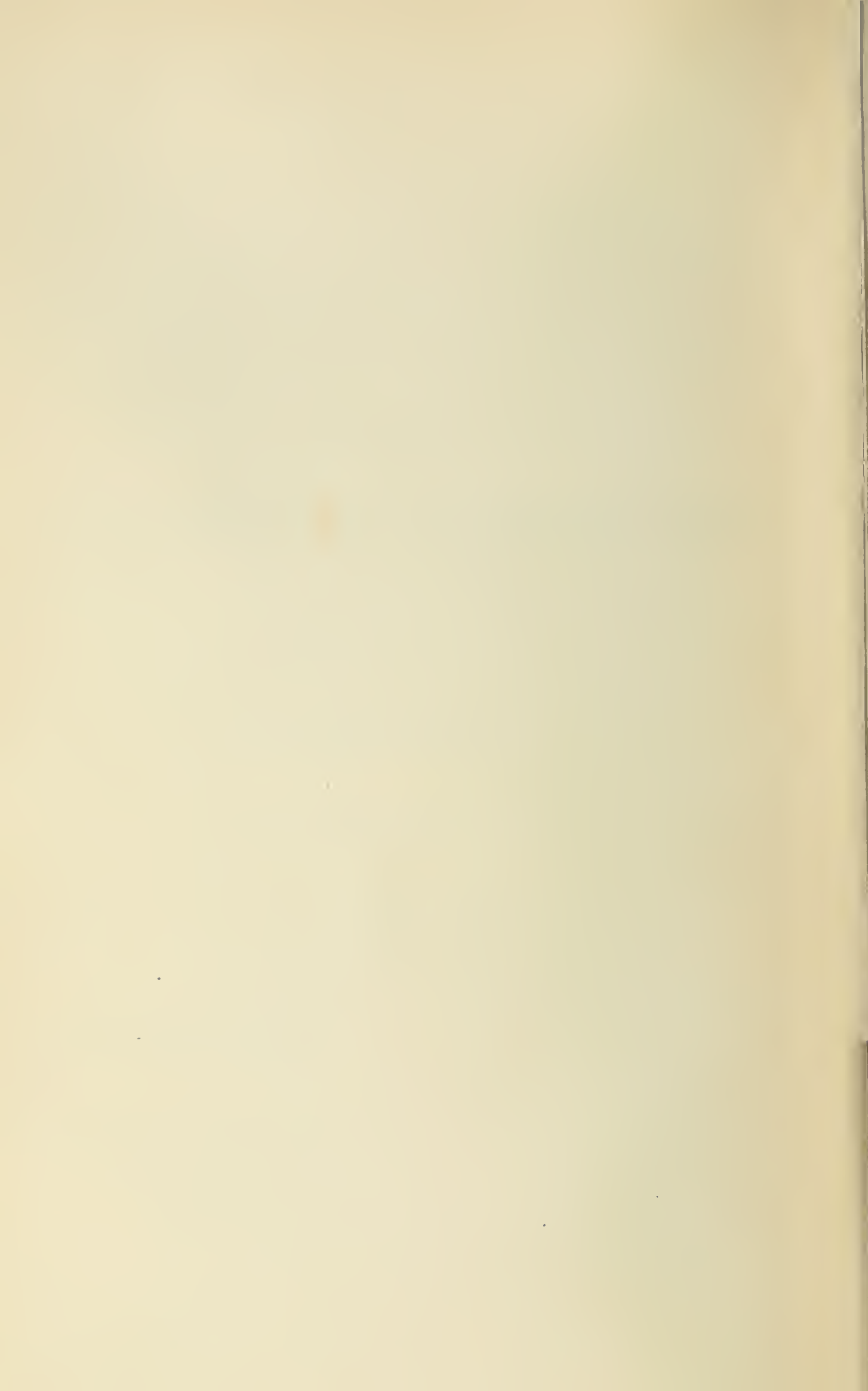
LORD CHIEF BARON,

This Work

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THE AUTHOR.



P R E F A C E.

THIS book it is hoped may be of use to students; and is intended to serve as a kind of skeleton, whereon may be subsequently adjusted the various ramifications, details, and distinctions, which are to be sought for and found in the great text books.

The general principles of common law are on the whole simple and clear; and it is the mass of cases reported, a large proportion of which turn upon their own peculiar facts, to which facts the general principles have to be applied, that makes each branch of law appear so formidable to the beginner. When once the general principles are firmly planted in the head, the student will follow the cases, which are corollaries or exceptions to those principles, and appreciate the decisions of the judges therein, with facility and profit; but until these general principles are clearly laid hold of, he is overwhelmed with what appears to him a chaotic and heterogeneous mass of legal learning.

I have therefore endeavoured to sketch out a backbone for the student to work upon, which, though I feel it must be very incomplete, will, I trust, enable the reader to marshal

PREFACE.

his ideas. My object has been, as far as possible, to present a series of legal canons, and to illustrate these, where the meaning and effect would not be absolutely patent to the novice, with short abstracts of reported cases; in this way combining a digest with a collection of leading authorities.

I have adopted the somewhat novel plan of printing in two colours, under the belief that such an arrangement might help the student to take a bird's-eye view of what is contained in these pages; and this plan must constitute my apology for the somewhat fanciful name of a "Rubric of the Common Law."

C. G. W.

3, PAPER BUILDINGS, TEMPLE.

June, 1880.

TABLE OF CONTENTS.

	PAGE
Table of cases cited	xi

BOOK I.

CHAPTER	I. Common law	1
"	II. A right of action	3
"	III. Forms of action	5
"	IV. Parties	8
"	V. Statutes of Limitation	13
"	VI. Of contracts generally.	17
"	VII. Contracts of record and specialty	18
"	VIII. Simple contracts	21
"	IX. Of the discharge of contracts	27
"	X. How a contract is vitiated	30
"	XI. The remedies for a breach of contract	35
"	XII. Contracts which must be under seal	37
"	XIII. Contracts which must be in writing	41
"	XIV. Of torts generally	50

BOOK II.

OF PARTICULAR CONTRACTS.

CHAPTER	I. Contracts for the sale of goods	53
"	II. Fraudulent sales of chattels	63
"	III. Of a sale of goods,—1. With a warranty	66
	2. On a condition precedent	70
	3. By fraudulent representations	71
"	IV. Contracts for work and labour	74
"	V. Bailments	82
"	VI. Contracts of indemnity,—1. Guaranties	95
	2. Insurance	100
"	VII. Contracts made with and by agents	107

	PAGE
CHAPTER VIII. Contracts in relation to marriage ...	127
.. IX. Instruments negotiable by indorsement and delivery ...	137
.. X. Landlord and tenant ...	153

BOOK III.

RELATING TO PARTICULAR TORTS.

PART I.

Of the Infringement of the Private Rights of Owners and Occupiers of Land.

CHAPTER I. Servitudes ...	176
.. II. Waste ...	194
.. III. Trespass to land ...	199

PART II.

Of Breaches of Duty by the Owners and Occupiers of Land.

CHAPTER I. Nuisances ...	202
.. II. The negligent use of real property ...	208

PART III.

Of the Infringement of the Rights of Owners of Chattels.

CHAPTER I. Trespass and conversion ...	210
.. II. Wrongful distress ...	214

PART IV.

Of Breaches of Duty in the Management of Chattels.

CHAPTER I. Of the negligent use of chattels ...	220
.. II. Negligent conduct of the bailees of chattels ...	227

PART V.

Of the Infringement of the Rights of the Person.

CHAPTER I. Battery and assault ...	229
.. II. Of false imprisonment ...	230
.. III. Of malicious prosecution and conspiracy ...	243
.. IV. Of defamation of character ...	246

TABLE OF CONTENTS.

ix

PART VI.

Of Breaches of Duty in Relation to the Person

PAGE

CHAPTER I. Negligent personal conduct	260
„ II. Of fraudulent representations	261

PART VII.

<i>Injuries Resulting from the Exercise of Statutory Powers</i>	268
--	-----

PART VIII.

<i>Of the Relation of Master and Servant</i>	272
---	-----

BOOK IV.

Damages	289
----------------	-----

APPENDIX.

29 Carl. II. c. 3, preamble and sects. 1, 2, 3, 4, 17 (Stat. of Frauds)	307
9 Geo. IV. c. 14, ss. 6, 7 (Lord Tenterden's Act)	308
1 Will. IV. c. 68 to s. 8, inclusive (The Carriers Act) 1830...	309
2 & 3 Will. IV. c. 71 to s. 4, inclusive (The Prescription Act) ...	312
8 & 9 Vict. c. 106, ss. 3, 9 (An Act to Amend the Law of Real Property)	314
17 & 18 Vict. c. 31, s. 7 (The Railway and Canal Traffic Act, 1854)	314
19 & 20 Vict. c. 97, s. 3 (The Mercantile Law Amendment Act) ...	315
26 & 27 Vict. c. 41 (The Innkeepers Act, 1863)	316
28 & 29 Vict. c. 86 (The Law of Partnership Amendment Act) ...	317
Index of examples	319
Index of illustrative cases	322
General index	331

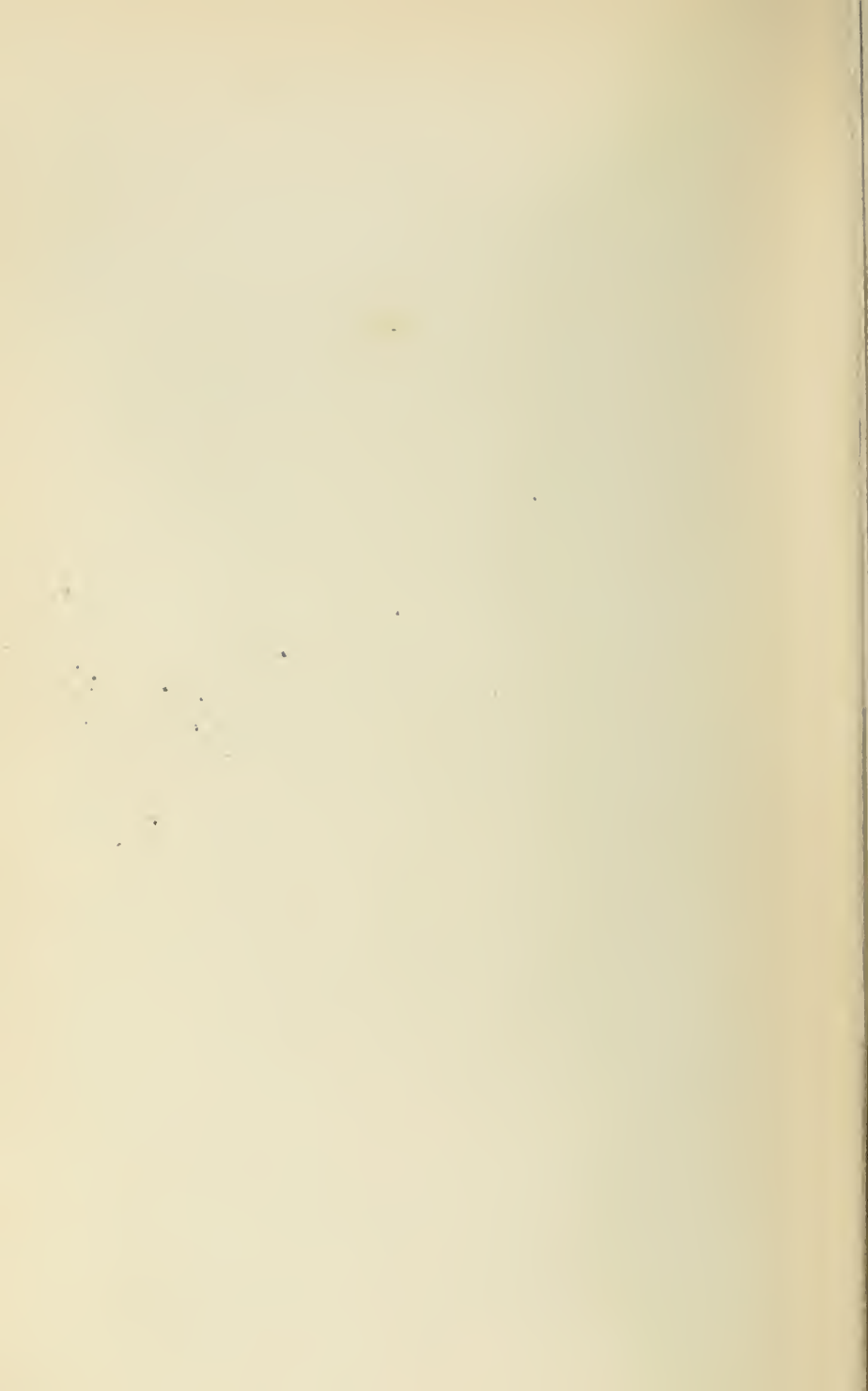


TABLE OF CASES CITED.

A.

	PAGE
Ackerman v. Ehrensperger ...	291
Ackroyd v. Smith ...	179
Acton, Atkin v. ...	75
Adames, Field v. ...	201
Addison v. Gandesequi ...	115
Affleck v. Child ...	251
Agar-Ellis, v. Lascelles ...	286
Alcott, Bennett v. ...	282
Aldous v. Cornwell ...	150
Aldridge v. Johnson ...	58
Allen, Hufler v. ...	19
Allen v. Wright ...	230
Alton v. Midland Railway Company	282
Ambler, Turner v. ...	244
Ambrose v. Kerrison ...	136
Amicable Society v. Bolland	106
Ancona v. Marks ...	113
Andrews, <i>Re</i> ...	284
Andrews v. Salt ...	286
Anon. ...	232, 264, 266
Appleby v. Myers ...	79
Arden v. Pullen ...	163
Armoury v. Delamirie ...	213
Ashby v. White ...	3
Ashlin v. White ...	261
Ashton, Storey v. ...	273
Ashton, Taylor v. ...	261
Astley v. Weldon ...	304
Atherton, Udell v. ...	72, 116, 264
Atkin v. Acton ...	75
Atkinson, Richardson v. ...	211
Attack v. Bramwell ...	292
Attenborough, Morley v. ...	67
Atherston, Nickells v. ...	165
Austin v. Guardians of Bethnal Green Union ...	39
Avery v. Cheslyn ...	196
Avery, Schmaltz v. ...	120

B.

Bacon, Spice v. ...	88
Badcock, Stephens v. ...	109
Bailey, <i>Ex parte</i> ...	281

PAGE

Bailey v. Bidwell ...	144
Bailey, Fitzmaurice v. ...	46
Bailey v. Lloyd ...	124
Bailey, Williams v. ...	30
Baines v. Ewing ...	119
Baker, Horn v. ...	195
Balchin, Bowditch v. ...	237
Baldwin v. Cole ...	211
Bamford v. Shuttleworth ...	123
Bamford v. Turnley ...	207
Bannerman v. White ...	71
Bannister, Eichholz v. ...	67
Barker, Price v. ...	100
Barker v. Richardson ...	189
Barrett, Towers v. ...	291
Barron v. Fitzgerald ...	110
Bartonsbill Coal Company v. Reid ...	280
Barwick v. English Joint Stock Bank	264
Baseley, Seward v. ...	229
Bates, Gerhard v. ...	264
Batson v. Newman ...	34
Bauman v. James ...	48
Baxendale, Hadley v. ...	290, 296
Baxendale, Rice v. ...	291
Baxter, Kellner v. ...	121
Baxter, Tarling v. ...	56
Bayes, Bennett v. ...	215
Bayes, Lee v. ...	54
Beal v. South Devon Railway Com- pany ...	227
Beardman v. Wilson ...	160
Beaumont v. Breugeri ...	44
Beek v. Rebow ...	196
Beekwith v. Philby ...	237
Beeston v. Collyer ...	74
Behn v. Kemble ...	261
Bell v. Welch ...	96
Benjamin v. Storr ...	294
Bennett v. Alcott ...	282
Bennett v. Bayes ...	215
Bennet v. Moita ...	274
Bennett v. Reeve ...	179
Bennett, Renno v. ...	75
Bentall v. Burn ...	45
Bergheim v. Great Eastern Railway Company ...	91

	PAGE
Cole, Baldwin <i>v.</i>	211
Cole, Young <i>v.</i>	71
Coleman, Glover <i>v.</i>	193
Collard <i>v.</i> South Eastern Railway Company	293
Collen <i>v.</i> Wright	122
Collins <i>v.</i> Bristol and Exeter Railway Company	94
Collinson <i>v.</i> Margetson	15
Collyer, Beeston <i>v.</i>	74
Comerford, Chatfield <i>v.</i>	244
Cook, Leeds <i>v.</i>	129
Cook <i>v.</i> Ward	248
Cooke, Lee <i>v.</i>	214
Cooke <i>v.</i> Wildes	258
Coombe <i>v.</i> Woolfe	98
Cooper, Davidson <i>v.</i>	150
Corbett, Douglas <i>v.</i>	245
Cork and Bandon Railway Company <i>v.</i> Goode	20
Cornelius, Harmer <i>v.</i>	76
Cornwell, Aldous <i>v.</i>	150
Corporation of Seaford, Crook <i>v.</i>	40
Cory <i>v.</i> Thames Iron Works Company	294
Coupland, Parmiter <i>v.</i>	255
Coulthart <i>v.</i> Clementson	99
Couturier <i>v.</i> Hastie	107
Coxhead <i>v.</i> Richards	251
Crauford, Lucena <i>v.</i>	102
Crawshay <i>v.</i> Eades	62
Crockford, Knight <i>v.</i>	47
Crook <i>v.</i> Corporation of Seaford	40
Cross, Reg. <i>v.</i>	206
Crosskey <i>v.</i> Mills	109
Crossland, North Eastern Railway Company <i>v.</i>	185
Crouch <i>v.</i> London and North-Western Railway Company	90
Croydon Gas Company <i>v.</i> Dickenson	98
Crozier <i>v.</i> Tomkinson	217
Cubley, Pigot <i>v.</i>	84
Cuckson <i>v.</i> Stones	76
Curtis, <i>Re</i>	284
Curtis <i>v.</i> Williamson	114
Cutter <i>v.</i> Powell	79

D.

Dalby <i>v.</i> Indian and London Assurance Company	105
Dale, Humfrey <i>v.</i>	116
Dalzell, Lynch <i>v.</i>	104
Dames, Indermaur <i>v.</i>	205
Daniel <i>v.</i> North	187
Darthez, Mitchell <i>v.</i>	80
Davenport, Farrell <i>v.</i>	157
Davenport, Thomson <i>v.</i>	114

	PAGE
Davey <i>v.</i> Shannon	42
Davidson <i>v.</i> Cooper	150
Davies <i>v.</i> Duncan	254
Davies <i>v.</i> England	278
Davies <i>v.</i> Mann	223
Davies, Offord <i>v.</i>	99
Davies, Penton <i>v.</i>	304
Davies <i>v.</i> Sear	184
Davies <i>v.</i> Solomon	246
Davies <i>v.</i> Williams	200, 282
Dawber, Foster <i>v.</i>	147
Dawber, Stead <i>v.</i>	28
Dawson, Birch <i>v.</i>	196
Deane <i>v.</i> Keate	86
Debenham <i>v.</i> Mellor	132
De Crespigny, Wellesley <i>v.</i>	248
Deflinne, Farrer <i>v.</i>	126
Degg <i>v.</i> Midland Railway Company	280
Delamirie, Armoury <i>v.</i>	213
Delaney <i>v.</i> Fox	163
De la Tour, Hochster <i>v.</i>	81
Delaval, Rex <i>v.</i>	284
De Manneville, Rex <i>v.</i>	284
Denman, Buron <i>v.</i>	229
De Pinna, Hopewell <i>v.</i>	9
Derrett, Kemp <i>v.</i>	155
Dickenson <i>v.</i> Gup	66
Dickinson, Croydon Gas Company <i>v.</i>	98
Dickson, Chartered Mercantile Bank of India <i>v.</i>	148
Dixon, Scott <i>v.</i>	264
Doe d. Graves <i>v.</i> Wells	168, 169
Doe d. Worcester School Trustees <i>v.</i> Rowland	290
Doorman <i>v.</i> Jenkins	227
Douglas <i>v.</i> Corbett	245
Dowson, Pickering <i>v.</i>	264
Duckworth, Carew <i>v.</i>	150
Duke of Brunswick, Gregory <i>v.</i>	245
Duncan <i>v.</i> Blundell	78
Duncan, Davies, <i>v.</i>	254
Dunn, McClaine <i>v.</i>	115
Dunn, Richardson <i>v.</i>	295
Dunsmore, Read <i>v.</i>	75
Duppa <i>v.</i> Mayo	215

E.

Eades, Crawshay <i>v.</i>	62
Eager <i>v.</i> Grimwood	282
Eastland <i>v.</i> Burchell	134
Eastwood, Hellawell <i>v.</i>	195
Eldowes, Stewart <i>v.</i>	48
Edgeware Highway Board <i>v.</i> The Harrow Gas Company	23
Edgington, Brown <i>v.</i>	68
Edmonds, Goring <i>v.</i>	99
Edmunds <i>v.</i> Bushell	119

	PAGE		PAGE
Edwards, <i>Ex parte</i>	286	Francis v. Cockrell	85
Edwards v. Halinder	208	Free, <i>Blades v.</i>	131
Edwards, Levy v.	238	Freeman, Pasley v.	262
Ehrensperger, Ackerman v. ...	291	Fryer v. Kynnersley	250
Richolz v. Bannister	67	Furber, Warrington v.	100
Elliot v. Nicklin	283	Fynn, <i>Ex parte</i>	284
Elliotson v. Feetham	206		
Elliott, Bishop v.	196		
Ellis v. Sheffield Gas Company ...	275	G.	
Elmore v. Stone	45		
Emery v. Emery	135	Gainsford v. Carrol	290
Emmerton v. Mathews	70	Galsworthy v. Strutt	302
England, Davies v.	278	Gammon, Bird v.	95
English Joint Stock Bank, Barwick v.	264	Gandesequi, Addison v.	115
Etherington v. Parrott	131	Gandy, Gott v.	163
Evans v. Walton	251	Gardiner, Onley v.	188
Ewart v. Cochrane	183	Gardner v. Grout	44
Ewing, Baines v.	119	Gaudet, France v.	294
Exall, Cheeseman v.	84	Gaunt, Fox v.	230
Exall v. Partridge	26	Gaussen v. Morton	108
		General Omnibus Company v. Linpus	274
F.		George v. Claggett	113
		Gerhard v. Bates	264
Farina v. Silverlock	266	Gibb v. Mather	147
Farrer v. Deffinne	126	Gibbons, Busst v.	244
Farrell v. Davenport	157	Gibbons v. Pepper	229
Farren, Kemble v.	306	Giblin v. McMullin	227
Fawcett v. Midland Railway Company	208	Gibson, Smale v.	102
Fettham, Elliotson v.	206	Glazebrook, Pearson v.	173
Felton, Hoey v.	300	Glover, <i>Ex parte</i>	286
Ferguson, Sainter v.	304	Glover v. Coleman	193
Festiniog Railway Company, Jones v.	269	Godfrey v. Turnbull	126
Field v. Adames	201	Goldsworthy, <i>Re</i>	285
Finch-Hatton, Wilson v.	162	Goode, Cork and Bandon Railway	
Finden, Kemp v.	100	Company v.	20
Firth, Boast v.	76	Goodwin v. Cheveley	199
Fitzgerald, Barron v.	110	Gordon, Jones v.	145
Fitzgerald v. Northcote	229	Goring v. Edmonds	99
Fitzmaurice v. Bailey	46	Goss v. Lord Nugent	28
Fletcher v. Marshall	108	Gott v. Gandy	163
Fletcher v. Rylands	203	Gould v. Robson	148
Fogg, Selway v.	30	Graham v. Hope	126
Ford v. Forster	266	Gray, Burgess v.	276
Forgan v. Bourke	74	Gray v. Jefferies	281
Forster v. Charles	261	Great Eastern Railway Company,	
Forster v. Mackreth	141	Bergheim v.	91
Foster v. Dauber	147	Great Eastern Railway Company,	
Foster, Ford v.	266	Berringer v.	281
Foster v. Stewart	283	Great Northern Railway Company,	
Foster, Strong v.	99	Laurence v.	268
Foulger v. Newcomb	247	Green v. General Omnibus Company	10
Foulkes v. Selway	129	Green, Price v.	32
Fowler v. Hollins	211	Gregory v. Duke of Brunswick ...	245
Fox, Delaney v.	163	Grey, Bloodworth v.	247
Fox v. Gaunt	230	Griffin, Lee v.	78
Fox, Wiggett v.	279	Grimwood, Eagle v.	282
France v. Gaudet	294	Grimwood v. Moss	168
		Grissell v. Bristowe	120

TABLE OF CASES CITED.

XV

	PAGE
Grote, Young <i>v.</i>	151
Grout, Gardner <i>v.</i>	44
Grymes <i>v.</i> Bowerin	196
Guardians of Bethnal Green Union, Austin <i>v.</i>	39
Gupp, Dickinson <i>v.</i>	66
Gurney, Peek <i>v.</i>	265
Gutteridge <i>v.</i> Munyard	161
Gye, Lumley <i>v.</i>	281

H.

Hadley <i>v.</i> Baxendale... ..	290, 296
Hailles <i>v.</i> Marks	244
Hales, Usil <i>v.</i>	253
Halinder, Edwards <i>v.</i>	208
Hall, Broom <i>v.</i>	295
Hall <i>v.</i> Hollander	283
Hall <i>v.</i> Wright	129
Hamilton <i>v.</i> Mohun	127
Hammond <i>v.</i> Reid	103
Hampden <i>v.</i> Walsh	33
Hanbury, Liebegs Extract of Meat Company <i>v.</i>	267
Hancock, Sharpe <i>v.</i>	176
Hardman <i>v.</i> Wilcox	111
Hardy, Berkeley <i>v.</i>	111
Hardy, Reg. <i>v.</i>	51
Harmer <i>v.</i> Cornelius	76
Harper <i>v.</i> Williams	301
Harrison <i>v.</i> Bush	256
Harrison <i>v.</i> Jackson	124
Harrison <i>v.</i> London Brighton and South Coast Railway Company	90
Harrison <i>v.</i> Seymour	77
Harrison, Wyatt <i>v.</i>	177
Harrow Gas Company, Edgware Highway Board <i>v.</i>	23
Hart <i>v.</i> Miles... ..	59
Hart <i>v.</i> Windsor	163
Harvey, Merest <i>v.</i>	289
Hastie, Conturier <i>v.</i>	107
Havelock, Roberts <i>v.</i>	80
Hawkins, Metropolitan Saloon Omni- bus Company <i>v.</i>	10
Hawkins <i>v.</i> Todd	251
Hawksworth <i>v.</i> Hawksworth	286
Hayward, James <i>v.</i>	204
Hayward, Thomas <i>v.</i>	159
Heath, Schneider <i>v.</i>	73
Hellawell <i>v.</i> Eastwood	195
Henderson <i>v.</i> Squire... ..	163
Herbert, Bryant <i>v.</i>	6
Hermann <i>v.</i> Seneschall	241
Hench <i>v.</i> London and North Western Railway Company... ..	94
Hewlins <i>v.</i> Shippam	182

	PAGE
Hickman, Wheatcroft <i>v.</i>	124
Higgins <i>v.</i> Senior	116, 122
Hill <i>v.</i> Royds	124
Hindley <i>v.</i> Lord Westmeath	136
Hindman, Robinson <i>v.</i>	75
Hiort <i>v.</i> Bott	212
Hiort <i>v.</i> London and North Western Railway Company	213
Hoadley <i>v.</i> McClaine... ..	47
Hobbs <i>v.</i> London and South Western Railway Company	298
Hochster <i>v.</i> De la Tour	81
Holy, Felton <i>v.</i>	300
Hole <i>v.</i> Sittingbourne Railway Company	277
Hollander, Hale <i>v.</i>	283
Hollins, Fowler <i>v.</i>	211
Holmes <i>v.</i> Clarke	278
Hood <i>v.</i> Carr	255
Hope, Graham <i>v.</i>	126
Hope <i>v.</i> Hope... ..	285
Hopewell <i>v.</i> De Pinna	9
Hopkins, Chanter <i>v.</i>	69
Hopkins <i>v.</i> Tanqueray	72
Hopwood <i>v.</i> Thorn	252
Horn <i>v.</i> Baker	195
Horne <i>v.</i> Midland Railway Company	299
Horsford <i>v.</i> Webster... ..	215
Horwood <i>v.</i> Smith	54
Howard <i>v.</i> Steward	117
Howe, Southern <i>v.</i>	266
Humble <i>v.</i> Hunter	112
Huffer <i>v.</i> Allen	19
Humfrey <i>v.</i> Dale	116
Humphreys <i>v.</i> Jones... ..	16
Humphries <i>v.</i> Brogden	178
Hunter, Humble <i>v.</i>	112
Hunter <i>v.</i> Parker	107
Huntley <i>v.</i> Russell	195
Hurstmonceaux, Rex <i>v.</i>	154
Hutchins, Chambers <i>v.</i>	214
Huth, Ormrod <i>v.</i>	261

I.

Imperial Gas Company, Church <i>v.</i>	40
Indermaur <i>v.</i> Dames... ..	204
Indian and London Assurance Com- pany <i>v.</i> Dalby	105

J.

Jackson, Harrison <i>v.</i>	124
Jackson <i>v.</i> Metropolitan Railway Company	226
Jackson, Saunderson <i>v.</i>	48

	PAGE		PAGE
James, Bauman <i>v.</i>	48	Leeds <i>v.</i> Cook	129
James <i>v.</i> Hayward	204	Lemesurier <i>v.</i> Logan	57
Jarrett <i>v.</i> Kennedy	261	Levy <i>v.</i> Edwards	238
Jefferies, Gray <i>v.</i>	281	Levy, Langridge <i>v.</i>	264
Jenkins, Doorman <i>v.</i>	227	Lewis, Wharton <i>v.</i>	129
Jewsbury, Swift <i>v.</i>	116, 263	Lewisham Board of Works, Cator <i>v.</i> ...	269
Jewson <i>v.</i> Read	8	Liebeg's Extract of Meat Company	
Johnson, Aldridge <i>v.</i>	58	<i>v.</i> Hanbury	267
Johnstone <i>v.</i> Sutton	244	Light, Reg. <i>v.</i>	238
Jolly <i>v.</i> Rees	132	Limpus <i>v.</i> General Omnibus Company	274
Jones, <i>Ex parte</i>	9	Lloyd, Bailey <i>v.</i>	124
Jones <i>v.</i> Festiniog Railway Company	269	Local Board of Swindon <i>v.</i> Lord	
Jones <i>v.</i> Gordon	145	Bolingbroke	273
Jones, Humphreys <i>v.</i>	16	Logan <i>v.</i> Lemesurier	57
Jones <i>v.</i> Just	68	Lomax, Kendrick <i>v.</i>	148
Just <i>v.</i> Jones	68	London, Brighton and South Coast	
		Railway Company, Harrison <i>v.</i> ...	90
K.		London and County Bank, Mat-	
		hiessen <i>v.</i>	143
Keate, Deane <i>v.</i>	86	London and North Western Railway	
Kelly <i>v.</i> Tinley	254	Company, Crouch <i>v.</i>	90
Kelner <i>v.</i> Baxter	121	London and North Western Railway	
Kemble, Belm <i>v.</i>	261	Company, Heugh <i>v.</i>	94
Kemble <i>v.</i> Farren	306	London and North Western Railway	
Kemp, Derrett <i>v.</i>	155	Company, Hiort <i>v.</i>	213
Kemp <i>v.</i> Finden	100	London and North Western Railway	
Kendrick <i>v.</i> Lomax	148	Company, Reddie <i>v.</i>	275
Kennedy, Jarrett <i>v.</i>	261	London and South Western Railway	
Kerrison, Ambrose <i>v.</i>	136	Company, Hobbs <i>v.</i>	298
King, Chamberlain <i>v.</i>	241	London and South Western Railway	
Knight <i>v.</i> Crockford	47	Company, Smith <i>v.</i>	299
Knight <i>v.</i> Lynch	246	London General Omnibus Company,	
Knight, Soane <i>v.</i>	255	Green <i>v.</i>	10
Knowhuan <i>v.</i> Bluet	42	London Supply Association, Pharma-	
Kimmsley, Fryer <i>v.</i>	250	ceutical Society <i>v.</i>	10
		Long <i>v.</i> Miller	48
L.		Loundes, Ward <i>v.</i>	36
		Lucas, Nash <i>v.</i>	215
Lake, Williams <i>v.</i>	46	Lucena <i>v.</i> Cranford	102
Lampleigh <i>v.</i> Braithwaite	23	Lumley <i>v.</i> Gye	281
Langridge <i>v.</i> Levy	264	Lumley <i>v.</i> Wagner	27
Lamphier <i>v.</i> Phipos	260	Lyall, Robinson <i>v.</i>	119
Lascelles, Agar-Ellis <i>v.</i>	286	Lynch <i>v.</i> Dalzell	104
Lawrence <i>v.</i> Great Northern Railway		Lynch <i>v.</i> Knight	246
Company	268		
Lavel, Magee <i>v.</i>	305	M.	
Laverick, Searle <i>v.</i>	86		
Lavery <i>v.</i> Turley	29	McClaine <i>v.</i> Dunn	115
Lawrence, Podmore <i>v.</i>	256	McClaine, Hoadley <i>v.</i>	47
Lawton <i>v.</i> Salmon	196	McCleod, McKenzie <i>v.</i>	274
Lawton <i>v.</i> Lawton	196	McEwan <i>v.</i> Smith	61
Leach, Swire <i>v.</i>	217	McKenzie <i>v.</i> McCleod	274
Lee <i>v.</i> Bayes	54	McMullin, Giblin <i>v.</i>	227
Lee <i>v.</i> Cooke	214	Mackretts, Forster <i>v.</i>	141
Lee <i>v.</i> Griffin	78	Madden, Bolton <i>v.</i>	22
Lee, Parkinson <i>v.</i>	70	Magee <i>v.</i> Lavell	305
Lee, <i>v.</i> Risdon	196		

	PAGE		PAGE
Mainwaring v. Brandon	295	Mohun, Hamilton v.	127
Maitland, Willingale v.	192	Moita, Bennet v.	274
Manley v. Saint Helen's Canal and Railway Company	270	Molynaux, Clark v.	250
Mann, Davies v.	223	Monsley, Villers v.	248
March v. March	285	Montefiori v. Montefiori	128
Margetson, Collison v.	15	Morley v. Attenborough	67
Marks, Aneona v.	113	Morton, Gausson v.	108
Marks, Hailes v.	214	Moore v. Rawson	193
Marlborough, Duke of; <i>Ex parte</i>	259	Moss, Grimwood v.	168
Marrable, Smith v.	162	Moyce v. Newington	54
Marshall, Fletcher v.	108	Mozley v. Tinkler	96
Martin v. Nutkin	36	Munyard, Gutteridge v.	161
Martin v. Smith	154	Murphy v. O'Shea	110
Mather, Gibb v.	147	Myers, Appleby v.	79
Mathews, Emmerton v.	70		
Mathiessen v. London and County Bank	143	N.	
Maule, Spill v.	251	Nash v. Lucas	215
May v. Burdett	205	Naylor, Wharton v.	217
Mayer, Squier v.	196	Netherclift, Seaman v.	256
Mayo, Duppa v.	215	Nettleship, British and Columbia Saw Mill Co. v.	297
Mellish, Richardson v.	295	Newcomb, Foulger v.	247
Mellor, Debenham v.	132	Newington, Moyce v.	54
Menlove, Vaughan v.	227	Newman, Batson v.	34
Merchant Tailors Company, Trust- cott v.	190	Newsom, Randall v.	69, 293
Merest v. Harvey	289	Nicholson v. Bradfield Union	40
Metropolitan Board, Brownlow v.	269	Nicholson, Moakes v.	59
Metropolitan District Railway Com- pany, Woodley v.	278	Nickells v. Atherston	165
Metropolitan Railway Company, Jackson v.	226	Nicklin, Elliott v.	283
Metropolitan Saloon Omnibus Com- pany, v. Hawkins	10	Noble v. Ward	28
Midland Railway Company, Alton v.	282	North, Daniel v.	187
Midland Railway Company, Blake v.	292	North v. Smith	272
Midland Railway Company, Degg v.	280	North British Australasian Company, Swan v.	222
Midland Railway Company, Faw- cett v.	208	North Eastern Railway Company v. Crossland	185
Midland Railway Company, Horne v.	299	North Staffordshire Railway Com- pany, Peek v.	92
Midland Railway Company, Ran- geley v.	178	Northcote, Fitzgerald v.	229
Midland Railway Company, Red- head v.	91	Nowill, Rodgers v.	266
Midland Railway Company, Stevens v.	243	Nugent, Lord, Goss v.	28
Mill, Wing v.	26	Nugent v. Smith	87
Miller, Bushell v.	210	Nutkin, Martin v.	36
Miller, Long v.	48		
Millington, Williams v.	120	O.	
Mills, Croskey v.	109	Oakley v. Oodeen	144
Mills, Hart v.	59	Offord v. Davies	99
Minton, Raymond v.	77	Onley v. Gardiner	188
Mires, v. Solebay	57	Oodeen, Oakley v.	144
Mitchell v. Darthez	80	Orchard, Roberts v.	241
Mizen v. Pick	134	Orinrod v. Heath	261
Moakes v. Nicholson	59	O'Shea, Murphy v.	110
		Oswell v. Vigne	103
		Oxley v. Watt	199

P.	PAGE	R.	PAGE
Pagham Commissioners, &c., <i>Rex v.</i>	51	Ramsden <i>v.</i> Brearley	9
Palmer, Parker <i>v.</i>	69	Randall <i>v.</i> Newson	69, 293
Palmer, Solarte <i>v.</i>	149	Rangleley <i>v.</i> Midland Railway Com- pany	178
Panton <i>v.</i> Williams	245	Rawson, Moore <i>v.</i>	193
Parker, Hunter <i>v.</i>	107	Raymond <i>v.</i> Minton	77
Parker <i>v.</i> Palmer	69	Read <i>v.</i> Dunsmore	75
Parker <i>v.</i> Taswell	153	Read, Jewson <i>v.</i>	8
Parker <i>v.</i> Winlow	122	Rebow, Beck <i>v.</i>	196
Parkinson <i>v.</i> Lee	70	Redhead <i>v.</i> Midland Railway Com- pany	91
Parmiter <i>v.</i> Coupland	255	Reddie <i>v.</i> London and North-Western Company	275
Parrott, Etherington <i>v.</i>	131	Rees, Jolly <i>v.</i>	132
Partridge, Exall <i>v.</i>	26	Reeve, Bennett <i>v.</i>	179
Pasley <i>v.</i> Freeman	262	Reg. <i>v.</i> Cross	206
Peck <i>v.</i> North Staffordshire Railway Company	92	Reg. <i>v.</i> Harley	51
Pearce <i>v.</i> Brooks	31	Reg. <i>v.</i> Light	238
Pearson <i>v.</i> Glazebrook	173	Reg. <i>v.</i> Taylor	258
Pease, Rex <i>v.</i>	270	Reid <i>v.</i> Bartonshill Coal Company	280
Peate, Bower <i>v.</i>	276	Reid, Hammond <i>v.</i>	103
Peek <i>v.</i> Gurney	265	Renn, Bennet <i>v.</i>	75
Pemberton <i>v.</i> Vaughan	32	Rex <i>v.</i> De Manneville	284
Penn <i>v.</i> Ward	229	Rex <i>v.</i> Delaval	284
Penton <i>v.</i> Davies	304	Rex <i>v.</i> Hurstmonceaux	154
Penton <i>v.</i> Robart	198	Rex <i>v.</i> Pagham Commissioners, &c.	51
Pepper, Gibbons <i>v.</i>	229	Rex <i>v.</i> Pease	270
Pettit, Thompson <i>v.</i>	291	Rex <i>v.</i> Phillips	258
Pharmaceutical Society <i>v.</i> London Supply Association	10	Rex <i>v.</i> Pocock	259
Phené <i>v.</i> Popplewell	165	Rex <i>v.</i> Smith	204
Phesey <i>v.</i> Vicary	182	Rex <i>v.</i> Weltje	259
Philby, Beekwith <i>v.</i>	237	Reynolds, Williams <i>v.</i>	294
Phillips <i>v.</i> Bistoli	43	Rice <i>v.</i> Baxendale	291
Phillips, Rex <i>v.</i>	258	Richards, Chasemore <i>v.</i>	4
Phlipos, Lauphier <i>v.</i>	260	Richards, Coxhead <i>v.</i>	251
Phippard, Pilliter <i>v.</i>	209	Richards <i>v.</i> Rose	185
Pick, Mizen <i>v.</i>	134	Richardson <i>v.</i> Atkinson	211
Pickering <i>v.</i> Dowson	264	Richardson, Barker <i>v.</i>	189
Piggott, Snrey <i>v.</i>	192	Richardson <i>v.</i> Dunn	295
Piggott <i>v.</i> Stratton	166	Richardson <i>v.</i> Mellish	295
Pigot <i>v.</i> Cubley	84	Ridgway <i>v.</i> Wharton	48
Pilliter <i>v.</i> Phippard	209	Riding <i>v.</i> Smith	295
Planché <i>v.</i> Colburn	81	Riscorla <i>v.</i> Thomas	24
Pocock, Rex <i>v.</i>	259	Risdon, Lee <i>v.</i>	196
Podmore <i>v.</i> Lawrence	256	Robart, Penton <i>v.</i>	198
Polkinghorn <i>v.</i> Wright	229	Roberts <i>v.</i> Havelock	80
Popplewell, Phéné <i>v.</i>	165	Roberts <i>v.</i> Orchard	241
Potter, Stockport Waterworks Com- pany <i>v.</i>	207	Roberts <i>v.</i> Smith	277
Powell, Cutter <i>v.</i>	79	Roberts <i>v.</i> Taylor	229
Powell, Sharp <i>v.</i>	291	Robins <i>v.</i> Bridge	123
Prentice, Bolton <i>v.</i>	135	Robinson <i>v.</i> Briggs	64
Prentice, Seare <i>v.</i>	260	Robinson <i>v.</i> Hindman	75
Price <i>v.</i> Barker	100	Robinson <i>v.</i> Lyall	119
Price <i>v.</i> Green	32	Robinson, Todd <i>v.</i>	118
Price <i>v.</i> Seeley	231	Robson, Gould <i>v.</i>	148
Prosser, Bromage <i>v.</i>	249	Rodgers <i>v.</i> Nowill	266
Pullen, Arden <i>v.</i>	163	Rogers, Chaplin <i>v.</i>	44

	PAGE
Rohde v. Thwaites	58
Rooks, Turner v.	134
Rose, Richards v.	185
Ross, Thompson v.	282
Rowland, Doe d. Worcester School Trustees v.	290
Royds, Hill v.	124
Russell, Cawkwell v.	193
Russell, Huntley v.	195
Ryder v. Ryder	283
Rylands, Fletcher v.	203

S.

Saint Helen's Canal and Railway Company, Manley v.	270
Saint Helen's Smelting Company v. Tipping	203, 207
Sainter v. Ferguson	304
Salmon, Lawton v.	196
Salt, Andrews v.	286
Sanders, Bloxam v.	60
Sanders v. Stewart	297
Saunderson v. Jackson	48
Schmalts, Avery v.	120
Schneider v. Heath	73
Scott v. Dixon	264
Scott v. Shepherd	301
Seaman v. Netherclift	256
Sear, Davies v.	184
Sear v. Prentice	260
Searle v. Laverick	86
Seeley, Price v.	231
Selge, Walter v.	203
Selway, Foulkes v.	129
Selway v. Fogg	30
Seneschall, Hermann v.	241
Senior, Higgins v.	116, 122
Seward v. Baseley	229
Seymour, Harrison v.	97
Shannon, Davey v.	42
Sharp v. Powell	291
Sharpe v. Hancock	176
Sheffield Gas Company, Ellis v.	275
Shepherd, Scott v.	301
Shippam, Hewlins v.	182
Shirley, Smith v.	200
Shuttleworth, Bamford v.	123
Sillen v. Thornton	105
Silverlock, Farina v.	266
Sittingbourne Railway Company, Hole v.	277
Six Carpenters' case	199
Smale v. Gibson	102
Smart, Tanner v.	16
Smith, Ackroyd v.	179
Smith, Horwood v.	54

	PAGE
Smith v. London and South Western Railway Company	299
Smith, McEwan v.	61
Smith v. Marrable	162
Smith, Martin v.	154
Smith, North v.	272
Smith, Nugent v.	87
Smith, Rex v.	204
Smith, Riding v.	295
Smith, Roberts v.	277
Smith v. Shirley	200
Smith, Tyson v.	191
Soane v. Knight	255
Solarte v. Palmer	149
Solebay, Mires v.	57
Solomon, Davies v.	246
Solomon v. Vintners' Company	186
South Devon Railway Company, Beal v.	227
South Eastern Railway Company, Collard v.	293
South of Ireland Collieries Company v. Waddle	39
Southcote v. Stanley	205
Southern v. Howe	266
Southwell v. Bowdich	122
Spice v. Bacon	88
Spill v. Maule	251
Squier v. Mayer	196
Squire, Henderson v.	163
Stafford, Worlston v.	214
Stanley, Southcote v.	205
Stead v. Dawber	28
Stephens v. Badcock	109
Stevens v. Midland Railway Company	243
Steward, Howard v.	117
Stewart v. Eddowes	48
Stewart, Foster v.	283
Stewart, Sanders v.	297
Stockport Waterworks Company v. Potter	207
Stone, Elmore v.	45
Stones, Cuckson v.	76
Storr, Benjamin v.	294
Storey v. Ashton	273
Stourton v. Stourton	286
Stratton, Piggott v.	166
Stray, Taylor v.	109
Strong v. Foster	99
Strutt, Galsworthy v.	302
Sturt v. Blogg	258
Suffield v. Brown	183
Surey v. Piggott	192
Sutton, Johnstone v.	244
Swan v. North British Australasian Company	222
Swift v. Jewsbury	116, 263
Swire v. Leach	217

T.		PAGE				PAGE	
Taff Vale Railway Company, <i>Vaughan v.</i>	271			<i>Vaughan, Pemberton v.</i>	...	32	
<i>Tanner v. Smart</i>	...	16		<i>Vaughan v. Taff Vale Railway Com-</i>	...	271	
<i>Tanqueray, Hopkins v.</i>	...	72		pany	...	...
<i>Tarling v. Baxter</i>	...	56		<i>Vicary, Phesey v.</i>	...	182	
<i>Tarrant v. Webb</i>	...	280		<i>Victoria Bank, Vandiemans Bank v.</i>	...	146	
<i>Taswell, Parker v.</i>	...	153		<i>Vigne, Oswell v.</i>	...	103	
<i>Tatton v. Wade</i>	...	262		<i>Villers v. Mousley</i>	...	248	
<i>Taylor v. Ashton</i>	...	261		<i>Vintners' Company, Solomon v.</i>	...	186	
<i>Taylor, Reg. v.</i>	...	258					
<i>Taylor, Roberts v.</i>	...	229		W.			
<i>Taylor v. Stray</i>	...	109		<i>Wade, Tatton v.</i>	...	262	
<i>Taylor, Willans v.</i>	...	244		<i>Waddell v. Bloeky</i>	...	110	
<i>Thames Iron Works Company,</i>				<i>Waddle, South of Ireland Collieries</i>	...	...
<i>Cory v.</i>	...	294		Company v.	...	39	
<i>Thom v. Bigland</i>	...	261		<i>Wagner, Lumley v.</i>	...	27	
<i>Thomas v. Hayward</i>	...	159		<i>Wain v. Warlters</i>	...	47	
<i>Thomas, Riscorla v.</i>	...	24		<i>Wainwright v. Bland</i>	...	106	
<i>Thomas, Tripp v.</i>	...	292		<i>Waithman v. Wakefield</i>	...	132	
<i>Thompson v. Pettitt</i>	...	291		<i>Wakefield, Waithman v.</i>	...	132	
<i>Thompson v. Ross</i>	...	282		<i>Walker v. Brewster</i>	...	204	
<i>Thompson v. Davenport</i>	...	114		<i>Walsh, Hampden v.</i>	...	33	
<i>Thorn, Hopwood v.</i>	...	252		<i>Walter v. Selfe</i>	...	203	
<i>Thornton, Sillem v.</i>	...	105		<i>Walter, Wason v.</i>	...	254	
<i>Thwaites, Rhode v.</i>	...	58		<i>Walton, Evans v.</i>	...	281	
<i>Tickle v. Brown</i>	...	186		<i>Ward, Cocking v.</i>	...	41	
<i>Tindal v. Brown</i>	...	147		<i>Ward, Cook v.</i>	...	248	
<i>Tinkler, Mozley v.</i>	...	96		<i>Ward v. Loundes</i>	...	36	
<i>Tinley, Kelly v.</i>	...	254		<i>Ward, Noble v.</i>	...	28	
<i>Tipping, St. Helen's Smelting Com-</i>				<i>Ward, Penn v.</i>	...	229	
pany v.	...	202, 207		<i>Warlters, Wain v.</i>	...	47	
<i>Told, Hawkins v.</i>	...	251		<i>Warrington v. Furber</i>	...	100	
<i>Todd v. Robinson</i>	...	118		<i>Wason v. Walter</i>	...	254	
<i>Tomkinson, Crozier v.</i>	...	217		<i>Watt, Oxley v.</i>	...	199	
<i>Towers v. Barrett</i>	...	291		<i>Waud v. Weeks</i>	...	247	
<i>Tripp v. Thomas</i>	...	292		<i>Waud, Wood v.</i>	...	50, 177	
<i>Trower v. Chadwick</i>	...	208		<i>Weaver v. Bush</i>	...	229	
<i>Truscott v. Merchant Tailors' Com-</i>				<i>Webb v. Bird</i>	...	188, 189	
pany	...	190		<i>Webb, Tarrant v.</i>	...	280	
<i>Turley, Lavery v.</i>	...	29		<i>Webster, Horsford v.</i>	...	215	
<i>Turnbull, Godfrey v.</i>	...	126		<i>Weeks, Wand v.</i>	...	247	
<i>Turner v. Ambler</i>	...	244		<i>Welch, Bell v.</i>	...	96	
<i>Turner v. Rookes</i>	...	134		<i>Weldon, Astley v.</i>	...	304	
<i>Turnley, Bamford v.</i>	...	207		<i>Wellesley, DeCrespigny v.</i>	...	248	
<i>Tyson v. Smith</i>	...	191		<i>Wells, Doe d. Graves v.</i>	...	168, 169	
				<i>Weltje, Rex v.</i>	...	259	
U.				<i>West v. Blakeway</i>	...	27	
<i>Udell v. Atherton</i>	...	116, 72, 264		<i>Westmeath, Lord, Hindley v.</i>	...	136	
<i>Usil v. Hales</i>	...	253		<i>Weston v. Wright</i>	...	119	
				<i>Wharton v. Lewis</i>	...	129	
V.				<i>Wharton v. Naylor</i>	...	217	
<i>Vandiemans Bank v. Victoria Bank</i>	146			<i>Wharton, Ridgway v.</i>	...	48	
<i>Vane, Lord, v. Lord Bernard</i>	...	195		<i>Wheatcroft v. Hickman</i>	...	124	
<i>Vaughan v. Menlove</i>	...	227		<i>White, Ashby v.</i>	...	3	
				<i>White, Ashlin v.</i>	...	261	
				<i>White, Baumerman v.</i>	...	71	
				<i>White v. Wilks</i>	...	57	

BOOK I.

CHAPTER I.

COMMON LAW.

§ COMMON LAW consists of—

1. *Lex scripta*. The statutes of this realm.

2. *Lex non scripta*. The *principles* and *usages* of private justice, moral fitness, and public convenience, in relation to persons and property, which have time out of mind been acknowledged to be binding, by the tacit consent of the civilised community.

(i) *For instance*. It is a *principle* of the above character that no contract is binding on the party, who has been induced to enter into it by the fraud of the other party.

(ii) That a man, who employs another to do an act, is legally himself the doer of that act.

(i) It is an *usage* that real property descends to the eldest son of the deceased.

(ii) That a man should have but one living wife at the same time.

§ USAGE. We may consider *usage* or *custom* under the heads of—

(i) *General customs*. Those which have grown up in the community at large. Such as the custom which regulates the inheritance of land. The custom which recognises as a crime the forging of a man's handwriting to the prejudice of his right.

(ii) *Particular or local customs.* Those, which have grown up in particular districts. Such as the *custom* of gavel kind, which regulates the inheritance of lands in the county of Kent. The *custom* of the City of London that a married woman, who is a trader within its precincts, may sue and be sued, as though she were a feme sole; or the *customs* prevailing in different manors.

§ A PARTICULAR CUSTOM, to be valid, must be one which—

1. Has existed for a period, during which the memory of man runs not to the contrary.
2. Has been uninterrupted and uncontested, so far as the right to exercise it is concerned.
3. Is reasonable.
4. Is certain and definite.

(iii) *The custom of merchants* (*Lex Mercatoria*). Practices, which for better convenience in trading, have grown up in the mercantile community. Such as the ready mode of assigning a debt by the creation of a bill of exchange. Or the convenient process of transferring the property in a cargo by endorsing and handing over a bill of lading.

CHAPTER II.

A RIGHT OF ACTION.

§ A **RIGHT OF ACTION** is the right of one who has suffered damage, either legal (*a*) or actual, to recover by means of an action at law, compensation from another, who has caused such damage by committing either—

(1) A breach of contract or

(2) A legal wrong. (*b*)

1. A *breach of contract* at once gives a cause of action.

2. A *tortious or wrongful act* (*injuria*) is essential to the support of an action other than an action for breach of contract. (See *post*, Chap. XIV.)

§ **DAMAGE** (*Damnum*) alone, however great, creates no liability.

Illustrations. 1. *Injuria sine damno*—

William White and three others, constables of the borough of Aylesbury, refused to receive the vote of Mathias Ashby, an elector of Aylesbury. He brought an action against the constables, and it was held, that, though he had suffered no actual pecuniary loss, still, as his right to vote had been invaded, he was entitled to maintain an action. (*c*)

2. *Damnum sine injuria*—

Chasemore owned a mill on the river Wandle, and enjoyed a prescriptive right to the use of the water of the river to turn his mill. Richards dug a well on his own adjoining land, and intercepted the underground

(*a*) See *post*, Chap. XIV. "TORTS."

(*b*) Recognized as such by the law. [See *post*, Chap. XIV.]

(*c*) *Ashby v. White*, 2 Ld. Ray 953.

water which used to percolate through the soil into the Wandle. Chasemore sued Richards for interfering with his right to have the water for the above-mentioned purpose. It was held that no action would lie, as, although no doubt the plaintiff had suffered considerable "*damnum*," the defendant had not committed any wrongful act, (*injuria*) which the courts could take cognizance of ; for the defendant had only acted within his rights, and the plaintiff (seeing that the action of water oozing through the soil is of so uncertain a character) had no rights, which had been infringed. (a)

(a) *Chasemore v. Richards*, 7 H. L. Ca. 349.

CHAPTER III.

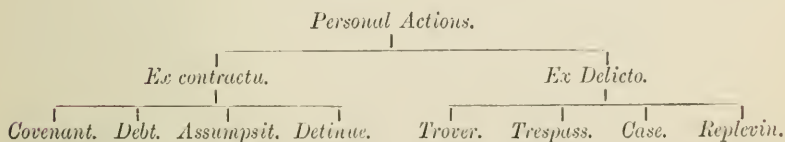
FORMS OF ACTION.

§ ACTIONS are no longer brought in any special form. Once there was a special form of action for each form of complaint; but now, some forms are obsolete, and some have been abolished by Act of Parliament.

By 3 & 4 Will. 4, c. 27, "An Act for the limitations of actions relating to real property," a goodly array of curious writs (see sect. 36) was wiped out. Three relating to real property, viz.: the "writ of right of dower," the "writ of right of dower *unde nihil habet*," and the writ of "*quare impedit*," which were excepted from the operation of sect. 36, were abolished by sect. 26 of 23 & 24 Vict. c. 126, "The Common Law Procedure Act, 1860." And the writ of ejectment, which was also excepted by sect. 36, was superseded by the Judicature Act, 1873.

§ The following classification of actions will nevertheless be useful—

Actions	{	Real, relating to land.
		Personal, relating to personalty.
		Mixed, relating to both.



Covenant. An action for the breach of a covenant in a deed.

Debt. An action to recover a specific sum of money due, and payable.

Assumpsit. An action founded on a promise. The word "assumpsit," he promised," being the governing word in the old Norman French form.

Detinue. An action for the *detention* of goods, founded on a fiction that the plaintiff had bailed the goods, sought to be recovered, to the defendant, who refused to give them up. *Specific goods can be recovered.*

This action is *in form*, therefore, one of contract; though the Court of Appeal has decided that it is *founded* on tort (*Delictum*), so as to give a plaintiff, who has in an action recovered more than £10, his costs under the County Court Act, 1856, 19 & 20 Vict. c. 108 [which in sect. 10 says, that where the plaintiff recovers in an action, founded on contract, a sum, not exceeding £20; and in action founded on tort, a sum not exceeding £10, he shall not be entitled to any costs of the suit, unless the judge, who tries the case, certifies that there was a sufficient reason for bringing the action in a superior court.]

Illustration. Bryant, a picture dealer, bought a picture, purporting to be painted by Herbert, R.A. He took it to Herbert to know if it was genuine. Herbert said it was not; and refused to give it back to Bryant. Bryant brought an action of detinue against Herbert, and recovered £10, the value of the picture, and 1s. damages for the detention. The whole sum recovered being therefore over £10 but under £20, if the action was founded on tort the plaintiff would get his costs; if on contract, he would not. The court decided that it was founded on tort. (a)

Trover or *Conversion.* An action to recover the value of goods, of which the owner has been wrongfully deprived, and which the wrong-doer has "converted" to his own

(a) *Bryant v. Herbert*, 3 C. P. D. p. 389.

use. It was originally founded on the fiction that the wrong-doer had *found* (*trouver* to find), and refused to give up the goods of the rightful owner.

Trespas. An action for any *direct* injury to, or wrongful meddling with, the person or property of another.

Case. Formerly, when a special and appropriate form of writ was used for each claim, and a claim arose, which did not come within any of the precedents, a new form of writ was issued, "*in consimili casu*," by the clerks in chancery, by virtue of the statute of Westminster 2 c. 24.

An action "on the case" lies for damages *indirectly* consequential on the wrongful act, whereas trespass only lies for directly consequent damages.

Replevin. See *post*, Book III. Part III. Chap. II.

CHAPTER IV.

PARTIES.

§ PERSONS WHO CANNOT SUE—

1. Felons.
2. Outlaws.
3. Alien Enemies.

§ PERSONS WHO CANNOT BE SUED—

1. The Sovereign.
2. Ambassadors of Foreign States.

§ PERSONS WHO CANNOT EITHER SUE OR BE SUED IN THEIR OWN NAMES—

1. *Persons of unsound mind* are incapable of instituting a suit : but the Court will, on application, appoint a committee to act for them.
2. *Infants* may sue in tort, by their *prochein amy*, or *next friend* ; and may by their guardians be sued in tort ; and also, for “ necessities,” in contract. (*a*)
3. *Married women* cannot appoint an attorney : or sue, or be sued, unless the husband is joined.

[But, by joining the husband, they can—

- a.* Sue, or be sued, for *torts*, committed against, or by them, and
- β.* On contracts entered into with them before marriage.]

§ EXCEPT—

- (i) When the husband is *civilly dead*, *i.e.* is undergoing penal servitude. (*b*)

(*a*) A person on arriving at full age cannot ratify a promise made by him during infancy. 37 & 38 Vict. c. 62.

(*b*) *Jewson v. Read*, Loft. 142.

- (ii) Or *legally dead*, i.e. when he has not been heard of for more than seven years. (c)
- (iii) When the wife has a judicial separation. In which case she is in the position of a *feme sole*. (d)
- (iv) When, on being *deserted* by her husband, she has obtained a protection order from the magistrates under the Divorce Court Acts. (e) In which case she is in the same position as a woman who has obtained a judicial separation. (f)
- (v) When—

^a She carries on a calling separate from her husband, and has therefrom acquired any separate property, by virtue of the "Married Woman's Property Act, 1870," (g) or

Her husband has agreed in writing that any property she had before marriage should belong to her as her separate property after marriage. (h)

She may bring an action for the protection and security thereof, in her own name. (i)

- (vi) By the custom of the City of London, when she is trading within its precincts on her own account.

[**NOTE.** But she cannot be made a bankrupt, even where she has separate estate, except where she can be sued, as in cases (i), (ii), (iii), (iv), and (vi). (*k*)]

§ 1. IN CONTRACTS, no one can *sue* or *be sued* who is not a party to the contract.

(c) *Hopewell v. De Pinna*, 2 Camp. 113.

(d) 20 & 21 Viet. c. 85, s. 26.

(e) 20 & 21 Viet. c. 85, s. 21 ; 21 & 22 Viet. c. 108, s. 6.

(f) *Ramsden v. Brearly*, L. R. 10 Q. B. 147.

(g) 33 & 34 Vict. c. 93, s. 1.

(h) 33 & 34 Vict. c. 93, s. 11

(i) 33 & 34 Vict. c. 93, s. 11

(k) Exp. *Jones*, 12 Ch. D. 484.

[illegible]

If the contract is made with more than one person, as with a firm of partners, all parties to either side of the contract must be joined in suing, or in being sued, as the case may be.

For example : Smith cannot sue Jones alone on a contract made by him with Jones and Brown jointly, or he would be setting up a contract different to the one really existing.

§ 2. *IN TORTS*, all who have been directly or indirectly injured by the wrongful act may *sue*, either separately or jointly.

If there are joint wrongdoers, they are all separately liable.

§ *CORPORATIONS* are enabled, either by the Charter, or the Act of Parliament, calling them into existence, to *sue* and *be sued* in their corporate name, on all contracts made with them under seal, [and, by certain Acts of Parliament, on contracts not made under seal, see *post*, Chap. XII.] which are not “*ultra vires*,” *i.e.* beyond the scope of the purposes for which they were created.

§ They can also be sued for torts committed by their agents; and for penalties; and can sue for torts committed against them. (*a*)

§ The right to bring or defend an action, either of contract or tort, cannot, as a rule, be transferred.

§ But there are *exceptions* to this rule—

I. *By custom.* The right to sue on an assigned debt has been introduced by the invention of bills of exchange (see *post*, Book II. Chap. IX.)

II. *By the common law.*—

1. The lessor has the right to sue his lessee's assignee upon covenants in a lease which run with the land (see *post*, Book II. Chap. X.)

(*a*) *Green v. London General Omnibus Company*, 29 L. J. C. P. 13; *Pharmaceutical Society v. London Supply Association*, 4 Q. B. D. 313; *Metropolitan-Saloon Omnibus Company v. Hawkins*, 28 L. J. Ex. 201.

2. *Executors and administrators* can sue and be sued in their representative capacity on *contracts* made with the deceased in his lifetime.

They can also sue for *torts* done to the property of the deceased.

But they cannot be sued for *torts* committed *by* the deceased, unless done within six months of his death (*b*).

3. *Husbands* can sue on *contracts* made with, and on *negotiable instruments* given to, their wives before marriage; and for *injuries* to, and on *covenants* running with, their wives' land; and for all their wives' choses in action.

III. *By certain Acts of Parliament.*—

1. The assignees of the reversion of a lease may sue and are liable to the lessees and assignees of such lease on covenants therein which run with the land. [32 Hen. viii. c. 34.]
2. The transferee of a promissory note may sue the maker. [4 Anne, c. 9, s. 1.]
3. The transferee of a bill of lading may sue the shipper of the goods consigned thereunder. [18 & 19 Vict. c. 111, s. 1.]
4. The assignee of a life or marine policy may sue thereon. [30 & 31 Vict. c. 144, and 31 & 32 Vict. c. 86.]
5. Choses in action belonging to companies which are being wound up are assignable. [25 & 26 Vict. c. 89, s. 157.]
6. A trustee in bankruptcy may bring or defend any action relating to the property of the bankrupt. [32 & 33 Vict. c. 71, s. 25, subs. 2. Bankruptcy Act, 1869.]

(b) 3 & 4 Will. 4, c. 42 s. 2. (Statute of Limitations.)

7. The assignee of any debt, or other chose in action, may sue for the same,

Provided—

- (i) The assignment is in writing.
- (ii) Express notice in writing is given to the debtor, trustee, or other party, from whom the assignor would be entitled to claim the debt.

[36 & 37 Vict. c. 66, s. 25, subs. 6. Judicature Act, 1873.]

CHAPTER V.

THE STATUTES OF LIMITATION.

§ THE legislature has thought fit to limit by statute the period within which a man shall be allowed to bring an action.

§ The governing Statutes of Limitation are as follows:—

* 21 Jac. 1 c. 16.

† 3 & 4 Will. 4, c. 27.

‡ 3 & 4 Will. 4, c. 42.

|| 5 & 6 Vict. c. 97, s. 5.

**19 & 20 Vict. c. 97, s. 9.

¶ 37 & 38 Vict. c. 57.

And by them the right to bring actions, in various cases, is limited as follows:—The asterisk, or other prefix denoting, on reference, by which Act each cause of action is affected.

§ IT IS LIMITED TO *Twenty* YEARS AFTER A CAUSE OF ACTION HAS ACCRUED.

‡ 1. In the case of rent payable under an indenture of demise.

† 2. On a judgment. [See *post*, p. 18.]

‡ 3. On a specialty. [See *post*, p. 20.]

‡ 4. On a recognizance. [See *post*, p. 19.]

§ IT IS LIMITED TO *Twelve* YEARS AFTER A RIGHT OF POSSESSION OR A CAUSE OF ACTION HAS ACCRUED.

¶ 1. For the recovery of land.

¶ 2. For the recovery of a mortgage debt *charged on land*.

¶ 3. For the recovery of a legacy *charged on land*.

¶ 4. For the recovery of any rent *charged on land*.

[NOTE. *Rent* here means—

(i) *Rent service*. An ancient rent coupled with fealty,

for which the services, in respect of which the land was originally held, have been commuted.

It may be *distrained* for at *common law*.

(ii) *Rent charge*. A rent reserved to the grantor out of the land granted, with a *power to distrain* for such rent, *charged* on the land by *the deed of grant*.

(iii) *Rent seck* (*Siccus*, dry rent). A rent reserved or granted out of land without the power of distraint being given by the deed of grant.

[But now, by 4 Geo. 2, c. 28, s. 5, a power of distraint is attached to all rents of this character.]

(iv) *Fee farm rent* (*feudi forma*). A perpetual rent, payable in respect of land let to a tenant for ever.

(v) *Chief or quit rent* (*quietus redditus*). A small rent payable by the freeholders and copyholders of manors.]

§ IT IS LIMITED TO *six* YEARS AFTER THE CAUSE OF ACTION HAS ACCRUED.

* 1. In assumpsit.

* 2. In debt.

**3. In account.

+ 4. For arrears of rent not reserved under a deed.

† 5. For interest on money charged on land.

* 6. In detinue.

* 7. In trover.

* 8. In trespass to land.

* 9. In replevin.

*10. In case.

‡11. Upon an award, where the submission to the arbitrator is not made by deed.

‡12. For fines due in respect of copyhold estate.

‡13. For money levied under a writ of *feri facias*.

§ IT IS LIMITED TO *four* YEARS AFTER THE CAUSE OF ACTION HAS ACCRUED.

* For trespass to the person.

§ IT IS LIMITED TO *two* YEARS AFTER THE CAUSE OF ACTION HAS ACCRUED.

* 1. For slander.

† 2. For penalties under a statute.

‖ 3. For injuries resulting from the exercise of local and personal acts of parliament.

§ **DISABILITY**, IN CASES WHERE THE LIMIT IS *Twelve* YEARS.

Persons under the disability of—

1. Infancy.

2. Coverture.

3. Unsoundness of mind.

and persons claiming through them, have *six years grace*, in which to bring their action, beyond the time when the disability ceased, *or* the person under disability has died, as the case may be.

• *Provided* that in no case an action is brought more than thirty years after the right first accrued. (*a*)

§ **THE OPERATION OF THESE STATUTES IS INTERRUPTED**, and made to start afresh.

1. In the case of any debt, or legacy, secured on land. (*b*)

2. In the case of specialty debts, (*c*) and

3. In the case of simple contract debts. (*d*)

(i) By part payment or part satisfaction on account of either principal or interest.

(ii) By an acknowledgement of the debt; which, in order to be valid must be—

“ In writing. (*c*) (*d*)

β Signed by the party chargeable, or his agent. (*d*) (*e*)

γ Unqualified, (*e*) or

(*a*) 37 & 38 Vict. c. 57, ss. 3 and 5.

(*b*) 37 & 38 Vict. c. 57, s. 8.

(*c*) 3 & 4 Will. 4, c. 42, s. 5.

(*d*) 9 Geo. 4, c. 14, s. 1.

(*e*) *Collinson v. Margetson*, 27 L. J. Ex. 305.

§. If *conditional*, the condition must be shown to have been fulfilled. (a)

Illustration. On the 6th June, 1833, Jones signed a joint and several promissory note, as surety for his brother Robert, and on application for payment on March 6th, 1841, wrote to Humphreys to say, that he, Humphreys, must make his claim on the note on his brother Robert's widow and executrix, and that "what she might be short, he would assist to make up." Mrs. Robert Jones, when applied to, paid nothing; and an action was brought in 1844, against Jones. The Court held that the conditional promise became absolute on Mrs. Jones' failure to pay. (a)

[**NOTE.** The words "I cannot pay the debt at present, but I will pay it as soon as I can," were held to be insufficient to defeat the operation of the statute, *in the absence of any proof of the debtor's ability to pay.* (b)]

[**NOTE.** The Lord Chancellor has, at the beginning of the present session (February, 1880) brought in a bill, in which it is proposed to reduce the period within which debts may be recovered, in the case of specialty debts from twenty years to twelve years, and in the case of simple contract debts from six years to three years. It is greatly to be hoped that such a measure may be passed, and there does not seem any good reason, why, in the case of simple contract debts, the period during which a claim may be brought should not be reduced still further; say to one year, in respect of sums *not exceeding* £10.]

(a) *Humphreys v. Jones*, 14 M. & W. 1.

(b) *Tanner v. Smart*, 6 B. & C. 603.

CHAPTER VI.

OF CONTRACTS GENERALLY.

§ CONTRACTS MAY BE—

1. *Executory*. That is, where there is a promise to do, or not to do, something in the future.
2. *Executed*. Where one, or both, of the contracting parties has carried out what he agreed to do.

For example, where Jones promises to pay Smith £6 a load for six loads of hay, which Smith is to deliver to him; when Smith has delivered the hay, the contract is *executed*, as far as he is concerned; but still *executory* on Jones' part, until Jones has made payment.

§ CONTRACTS MAY ALSO BE—

1. *Express*. Where the terms of the contract are clearly defined by both parties.
2. *Implied*. Where the law presumes a contract from an existing state of facts.

For instance, if Jones, who is a gardener, works in Smith's garden for a month at Smith's request, the law *presumes* a contract on Smith's part to give Jones reasonable wages for his labour.

§ CONTRACTS ARE OF THREE KINDS—

1. Of record.
2. Of specialty.
3. Simple.

CHAPTER VII.

CONTRACTS OF RECORD AND SPECIALTY.

I. CONTRACTS OF RECORD—

1. *Judgments.* A judgment recovered in a court of competent jurisdiction, whether English, foreign (which includes Scotch and Irish judgments), or colonial, constitutes a contract of the highest kind; and an action can be brought thereon.

[But no costs can be recovered in an action on an English judgment without an order from the judge trying the case, as the plaintiff might have realised his judgment by execution (a).]

2. *Statutes merchant.* Bonds of record acknowledged before the clerk of the statutes merchant, and the Lord Mayor of London, or a mayor of some other city or borough, sealed with the seal of the debtor and of the Sovereign; and conditioned, that if the debtor fails to pay his debt, by a certain day, execution may be awarded against his lands and goods.

3. *Statutes staple.* Bonds of like nature to the preceding only acknowledged before the mayor and constables of the staple in the chief cities.

[*Stapulum*, *Estate*, a market. The merchants of the principal “staples,” or marts, originally held courts, and exercised a certain jurisdiction for the regulation of their particular trades in Westminster, York, Lincoln, Canterbury, Norwich, Newcastle, Chichester, Winchester, Bristol, and other cities.]

(a) 43 Geo. 3, c. 46, s. 4.

4. *Recognizances.* Bonds of record, wherein an existing debt is acknowledged to the Sovereign, sealed with the seal of the "cognisor" (the debtor), the Sovereign, and one of the chief justices; and conditioned like a statute merchant.

§ PECULIAR ATTRIBUTES OF A CONTRACT OF RECORD—

1. *It "works a merger."* That is to say, it absorbs, and is substituted for, or "merges," a contract of a less high kind, of which the substance is the same, on the principle that the greater contains the less.

For instance, if Jones is bound to Smith in a bond, or specialty (see *post*, p. 20), and Smith sues and recovers *judgment* on the bond, Smith's right of action on the bond is gone, the specialty contract being swallowed up in the contract of record; and Smith, in future, if he wants to sue at all, must sue on the judgment.

[But this is not the case with foreign and colonial judgments.]

2. *It acts as an estoppel.* That is, it concludes all parties to it, and those claiming through them, from setting up anything in contradiction of its terms, so long as it remains unreversed.

Illustration. One Huffer owed Allen £28. Allen brought an action for the money. Huffer entered no appearance, but paid Allen £10 on account. Allen then wrongfully signed judgment for the whole debt, and issued execution for £32, debt and costs, and arrested Huffer. Huffer, without getting this judgment set aside, brought an action against him for maliciously signing judgment and issuing execution. The court held that, *whilst the judgment stood for the full amount*, the plaintiff was estopped from denying the correctness of the judgment and execution, and that, Huffer therefore, was unable to recover. (*b*)

3. *It requires no consideration to support it.* (See *post*, p. 22.)

(b) *Huffer v. Allen*, L. R. 2 Ex. 15.

II. CONTRACTS BY SPECIALTY, that is—

1. Contracts under seal, which may be by—
 - (i) Deed poll (unilateral).
 - (ii) Indenture (*inter partes*).
2. Contracts created by virtue of Acts of Parliament. [As an obligation to pay “calls” on shares. (a)]

§ PECULIAR ATTRIBUTES OF A CONTRACT BY SPECIALTY.

1. “*It works a merger.*” That is, it absorbs, and is substituted for, a simple contract debt, like a contract of record. *For instance*, Jones’ bond (see *ante*, p. 19, Illustration) may have been given to Smith, to secure a debt owing by Jones to Smith for goods supplied; in which case the simple debt would be “merged” in the higher contract, the bond; and Smith could not sue for the simple debt, but would have to take his remedy on the bond, if its terms were not complied with.
2. *It acts as an estoppel*; for where a man has entered into a solemn engagement, by deed under his hand and seal, as to certain facts, he is not, in the absence of fraud, permitted to deny any matter to which he has so assented.
3. *It requires no consideration to support it*, because consideration is presumed from the deliberation of the act.
4. *It binds the heir and devisee.* That is to say, where a man in a bond expressly binds himself *and his heirs*, the heir, or devisee of his lands, is bound to discharge the specialty debt, to the extent of the assets of which he becomes possessed.

(a) *Cork and Brandon Ry. Co. v. Goode*, 13 C. B. 826.

CHAPTER VIII.

SIMPLE CONTRACTS.

§ **SIMPLE CONTRACTS** are those neither of record, nor under seal. They may either be in writing or by word of mouth.

§ **REQUISITES—**

1. A simple contract must be *certain*. That is to say, its terms must have been definitely settled.
2. There must be an *assent* of *both* parties.
3. *Privity* must exist between the contracting parties. That is, the relation of contractor and contractee must be directly recognised by both of them.

For example. There is privity of contract between a lessor and a lessee; but, if the lessee sub-lets, there is no privity of contract between the original lessor and the under-lessee.

[**NOTE.** It has been said that “mutuality” is also essential to a simple contract. If the meaning of this word is that one party to a contract must be bound, if the other is bound; it may be observed that there are many contracts of an unilateral character, which can be enforced by one party only; as a contract between an infant and an adult, which is void as regards the one, but binding on the other. There are, however, numerous contracts, where “mutuality” is essential; of which a contract of purchase and sale is an instance; for it is mutually binding on both sides, and the promise of the one party is the consideration for the promise of the other.]

§ **A SIMPLE CONTRACT HAS THREE PARTS**, in the absence of any one of which it is incomplete.

1. *The request*, on the part of the promisor.
2. *The consideration*, moving from the promisee.
3. *The promise* by the promisor.

For example. An agreement between Jones and Smith, that if Smith will refrain from suing Jones' nephew for six months, Jones will destroy a bill of exchange, which he holds, and on which Smith is liable.

This contract can be resolved as follows:—

Jones—"Will you forbear to sue my nephew for six months?"

Smith—"I will."

Jones—"Then, I will tear up your acceptance."

Here we have Jones *requesting* Smith to forbear to sue, Jones agreeing to do so; and this forbearance is the *consideration*; and finally a *promise* by Jones to tear up the document.

We will now take each of these parts separately, but it will be more convenient to take them in a different order.

- I. **THE CONSIDERATION** is an act, or an abstention from doing an act, on the part of the promisee, which is of benefit to the promisor, or a detriment to the promisee, however small the benefit, or the detriment.

Illustrations—

1. Bolton and Madden were subscribers to a charity, the objects of which were elected by the subscribers. Bolton agreed to give 28 votes to Madden's candidate, if at the following election Madden would give 28 votes for Bolton's candidate. Bolton carried out his part of the contract, but Madden at the next election made default, and Bolton had to subscribe £7 7s. to the charity in order to procure 28 votes. In an action by Bolton to recover the £7 7s., it was held that there was a good consideration for the promise (a).

(a) *Bolton v. Madden*, L. R. 9, Q. B. 55.

2. The Harrow District Gas Company agreed with the Edgware Highway Board, that if the Board would allow them to open a certain road, they would make good the surface, and pay the Board one shilling per yard of the highway broken up. On the Gas Company refusing to restore the road, or to make the stipulated payment, the Board sued them; and the Court held that there was a good consideration for the promise made by the Gas Company. (b)

§ THE CONSIDERATION IS EITHER—

1. *Executory*, that is when the act to be done has not yet been carried out, or
2. *Executed*, when it has been carried out.

II. THE PROMISE will not be binding—

1. If there is no consideration; that is, a bare promise on one side with no counter-balancing advantage.
2. If the consideration was executed before the promise was given.

UNLESS there was a *request* (see *post*) by the promisor, previous to the executing of the consideration by the promisee.

Illustration. Braithwaite, who was found guilty of manslaughter, requested Lampleigh to endeavour to obtain the King's pardon for him. Lampleigh occupied many days in the attempt, but unsuccessfully. Braithwaite afterwards promised to give him £100; and not paying, was sued by Lampleigh for the money. It was held, that as there had been a previous request on Braithwaite's part, the promise was binding on him. Whereas, if it had been otherwise, Lampleigh's labour would have been a mere voluntary act of courtesy; and this, having been past, and done, when the promise was given, would have failed to make the promise binding. (c)

(b) *Edgware Highway Board v. Harrow Gas Company*, L. R. 10, Q. B. 92.

(c) *Lampleigh v. Braithwaite*, Hobart 105.

§ THE PROMISE MAY BE—

1. *Express.*2. *Implied.* And it is implied in all cases, where

(i) The consideration is executory.

(ii) The consideration is *executed*, if *moved by a previous request*, express, or implied (see *post*, p. 25).

For example. If Jones has asked Smith to forbear to sue, as before, upon Jones tearing up the acceptance, and Smith does forbear to sue, till the six months has elapsed, the law will imply a promise on Jones' part to destroy Smith's acceptance.

Except a Where the promisee has voluntarily done that, which the promisor was *legally compellable* to do ; for in such a case there must be an *express* promise to make a valid contract.

For example. Where Jones has asked Smith to pay his, Jones' rates, and Smith has voluntarily done so, the law will not *imply* a promise on Jones' part to repay Smith.

β. In the case of barristers' and physicians' fees, which are in the nature of an *honorarium*.

§ The promise implied will only be co-extensive with the consideration executed ; otherwise, for some part of the promise there would be no consideration, and there would be a case of *nudum pactum*.

Illustration. Risorla, at the instance of Thomas, bought of him a horse, and then sued Thomas for the breach of a warranty that it was free from vice, alleging that there was an implied promise of warranty from the fact of the sale. But it was held that the only promise which could be implied from the sale was a promise to deliver the horse, and not one of warranty, that it was free from vice. (*a*)

(*a*) *Risorla v. Thomas*, 3 Q. B. 234.

III. THE REQUEST is either—

1. Express, or
2. Implied.

§ IT IS IMPLIED—

- (i) In all cases where the consideration is *executory*.

For example. Where Jones agrees to canvass for Smith at the coming election, and Smith promises to give him £10; a request from Smith to Jones is implied by law.

- (ii) It is *not* implied, and must be proved, in order that the contract may be valid, where the consideration is *executed*.

Except—

1. Where, from the nature of the contract, it is clear, there *must* have been a request.

For example. Where money is lent, there is an implied request on the borrower's part, to the lender, to make the advance.

2. Where the promisor has adopted, and enjoyed the benefit of the consideration.

For example. Where Jones has bought goods of Robinson, on Smith's account, but without Smith's knowledge or authority, and Smith has afterwards agreed to keep, and pay for, and has kept, them; the law will, to support Smith's promise, imply a request, by Smith to Robinson, to sell the goods.

3. Where the promisee has been *compelled* to do what the promisor was legally compellable to do.

Illustration. Partridge was a coachbuilder, and Exall, at his request, bailed his carriage to him for safe custody. Partridge's landlord distrained on the car-

riage for rent, which Exall paid. It was held that he could recover from Partridge the sum so paid, as money paid at Partridge's request. (a)

4. Where the promisee has *voluntarily* done that which the promisor was legally compellable to do, and the promisor has afterwards in consideration thereof, *expressly* promised.

Illustration. Wing, an apothecary, attended a pauper, whom the parish of Silk Willoughby (of which Mill was an overseer), was bound to support. Mill, after the pauper's death, told Wing to make out his bill to the parish, and that it should be paid. The Court held that Mill's promise amounted to an acknowledgement that Wing had attended the pauper at the request of the parish. (b)

(a) *Exall v. Partridge*, 8 T. R. 308.

(b) *Wing v. Mill*, 1 B. and Ald. 104.

CHAPTER IX.

OF THE DISCHARGE OF CONTRACTS.

I. **CONTRACTS UNDER SEAL** can be discharged—1. *Before breach* by another instrument under seal only.

Illustration. One Hicks took a lease from John West of certain premises, and thereby covenanted to yield up at the expiration of his term all erections and improvements on the demised premises. During the term he erected a greenhouse, which at the end of his term was removed. In an action by the executors of John West against Blakeway, to whom Hicks had assigned the lease, for a breach of the covenant, a letter was put in from John West, written before the greenhouse was erected, giving Hicks leave to remove it at the expiry of the term. It was held that the license in writing was no discharge of the defendant's liability under the covenant in the indenture of lease. (c)

2. *After breach.*—

(i) By another instrument under seal.

(ii) By accord and satisfaction (see *post*, p. 28).

Provided unliquidated damages only are sought to be recovered.

Illustration. Eden let a house to Price, who covenanted to repair. Price assigned to Blake. In an action against Blake by Eden

(c) *West v. Blakeway*, 3 Sc. N. R. 199. But a Court of Equity would grant an injunction to restrain the breach of an agreement, [*Lumley v. Wagner*, 5 De G. & Sm. 485] so that a written agreement *not to enforce* a specialty contract would, since the Judicature Act, 1873, be maintainable in a Court of Law.

for not repairing, a defence was raised of an agreement with Eden by which the defendant was discharged from his liability. It was held that this would have been no answer to a claim *for a sum certain*, as under a bond; but that it was a good answer to a claim for *damages*, which were of an uncertain amount, not depending on the terms of the covenant. (a)

II. SIMPLE CONTRACTS can be discharged—

1. *Before breach*—

- (i) By a subsequent parole agreement.

[NOTE. A contract, which is bound to be in writing under the Statute of Frauds (see *post*, Chap. XIII.), can, it is conceived, be put an end to *simpliciter* by word of mouth; (b) though this has never been expressly decided. It can be rescinded by the substitution of another valid contract in writing. (b)]

- (ii) By being merged in a subsequent contract under seal.

2. *After breach*—

- (i) By a release under seal.
- (ii) By “accord and satisfaction”: that is, where something is given, or done, to or for, the one party by the other party, and agreed to by the former, as satisfying the cause of action.

Illustration. Turley took a publichouse, called “The Edinboro’ Castle,” from Lavery, a wine merchant, and paid him £100 on account of the stock and fixtures. Lavery afterwards supplied him with wine, and brought an action

(a) *Blake’s case*, 6 Coke’s Rep. 43 b.

(b) *Goss v. Lord Nugent* 5 B. & Ad. 65; *Stead v. Dawber*, 10 Ad. & E. 65; *Noble v. Ward*, L. R. 2 Ex. 135.

for the price of it. Turley set up in answer an agreement with Lavery to surrender the public-house, and be repaid the £100, and exonerated from all charge for the wine. It was held that this agreement was a good accord and satisfaction. (c)

[NOTE. A smaller sum paid, without further consideration, is no satisfaction for a claim for a larger one. But in everything but a money payment, the value of the thing given in satisfaction is not material.]

(c) *Lavery v. Turley*, 30 L. J. Ex. 49.

CHAPTER X.

HOW A CONTRACT IS VITIATED.

- I. FRAUD.** A contract induced by fraud is not void, but is voidable at the option of the party defrauded. He may elect to treat it as void, or not, as he likes.

And he must make his election as soon as he discovers the fraud.

Illustration. Selway agreed with Fogg to cart away a quantity of rubbish for £15. He afterwards sued Fogg for £20, as the price of the labour done, alleging that Fogg had fraudulently misrepresented the quantity of rubbish to be removed, and thereby induced him to do the job for £15. It was held that he might have repudiated the contract, and sued in an action of deceit (an old form of action now extinct) but as he had elected to sue on the contract, he could only recover the £15. (a)

[See also *post*, Book II. Chap. III. and Book III. Part VI. Chap. II.]

- II. DURESS.** A contract made under improper pressure is void.

Illustration. James Bailey, whose son had forged his father's name to a number of promissory notes, and had got them cashed at the bank of Williams, Bros., agreed with the bank to mortgage his property to them to secure the amount of the notes, in consideration of the bank forbearing to prosecute. It was held that he was not a free and voluntary agent, and that the contract was void. (b)

(a) *Selway v. Fogg*, 5 M. & W. 86.

(b) *Williams v. Bailey*, L. R. 1 H. L. 200.

III. MISTAKE. A contract based upon a misapprehension of facts *by both parties* is void; and money paid under a mistake of *facts* can be recovered back. (c)

Illustration. Joseph Willis was tenant for life of an estate, and died on September 24, 1863, insolvent. On October 28, 1863, Cochrane, Joseph's assignee, who was intending to cut and realize the timber on the estate, and Daniel Willis, the tenant in tail, who was anxious to save the timber, both being ignorant of Joseph's death, agreed that Cochrane should have the same right to the timber, as if he had actually cut it on August 15, 1863. Daniel would obviously not have signed such an agreement had he known of Joseph's death; as, on that event happening, he became entitled to, and the assignee lost his claim upon, the timber. It was held that the agreement was founded on a mistake, and without consideration, and therefore void. (d)

IV. AN IMMORAL CONSIDERATION avoids a contract; as, where a bond or promissory note is given to a woman in order to induce her to live in a state of concubinage.

Illustration. Pearce & Co. were coachbuilders, and sued a prostitute for hire of a brougham. They had supplied it with the knowledge that it would be used by her as part of her display to attract men. The Court held that Pearce & Co. could not recover. (e)

V. CONTRACTS OPPOSED TO PUBLIC POLICY ARE VOID.

Examples. 1. A contract by a father to abstain from seeing or exercising any control over his children.

2. A contract of *maintenance*; that is to furnish money to be risked on the event of a law suit by one who has no interest in the litigation.

(c) But not when the mistake is one of *law*.

(d) *Cochrane v. Willis*, L. R. 1 Ch. 58.

(e) *Pearce v. Brooks*, L. R. 1 Ex. 213.

3. A contract of *champerty*; that is, to furnish money for the maintenance of an action on the terms of sharing the proceeds if successful.

4. A contract in *general restraint of trade*.

[NOTE. But, if it is only to abstain from exercising a trade in a *particular locality*, it is good; but it must be within reasonable limits.

Illustrations. (a.) Gosnell and Price were hairdressers in London. They dissolved partnership, and Gosnell bought out Price, and Price covenanted with him not to carry on a similar business in London or Westminster, or within 600 miles of the same under a penalty of £5,000. In an action by Gosnell's executor against Price for breach of the agreement, it was held that the covenant was valid as far as it related to London and Westminster, but void as regarded the further limit of 600 miles, as being in restraint of trade. (a)

(β.) Vaughan gave up a shop, premises, and goodwill, and a receipt for making ginger beer to Pemberton for £7 10s. 0d., and agreed not to open a shop in the same line of business within a mile, under a penalty of £20. Vaughan did open a ginger beer shop within the prescribed limit, and Pemberton brought an action for the penalty. The Court held that the agreement was not in restraint of trade. (b)]

VI. ILLEGALITY OF CONSIDERATION. Where the contract is to do something in contravention of an Act of parliament, or of the common law, it is void.

Examples. 1. A vendor of game, not having taken out a game-dealer's license under 1 & 2 Will. 4, c. 32, cannot sue for the price of the game sold.

2. Nor can one, who sells coals by measure instead of by weight, as ordered by 5 & 6 Will. 4, c. 63, s. 9.

(a) *Price v. Green*, 16 M. & W. 346.

(b) *Pemberton v. Vaughan*, 16 L. J. Q. B. 161.

3. Nor can a publican who sells beer on credit on the premises. (c)
4. Nor can one who sells goods (other than milk, macerel and bread under certain restrictions) *in the way of his trade* on the Lord's day. (d)
5. *Contracts by way of gaming* are void.

No action can be brought by the *winner* to recover, either the bet from the loser, or money deposited in the hands of a third party to abide the event on which a wager is made. (e)

But the party making the deposit, may, even after the event has happened, if the stakeholder has not paid over the sum deposited, to the winner, give the stakeholder notice not to pay it over, but to return it, and can sue him for the amount.

Illustration. Hampden asserted that the world was flat; Wallace that it was round. They each deposited £500 with Walsh, who was to give his decision on the point, and to pay over the two deposits to the winner. Walsh decided in favour of Wallace, and though Hampden gave him notice not to part with his £500, he nevertheless paid over the two sums deposited, to Wallace. Hampden sued Walsh for his £500, and the Court held that the transaction was a wager, but that the plaintiff was entitled to recover his deposit from the defendant, the stakeholder. (f)

§ “*A contribution*,” however, to a prize for the winner of a game not forbidden by statute, is excepted from the operation of section 18 of 8 & 9 Vict. c. 109.

For instance, subscriptions of so many sovereigns, to be run for by race horses.

(c) 30 & 31 Vict. c. 142, s. 4.

(d) 29 Carl. 2, c. 7, s. 1.

(e) 8 & 9 Vict. c. 109, s. 18.

(f) *Hampden v. Walsh*, 1 Q. B. D. 189.

§ But in the following case the Court held the transaction therein mentioned was simply a wager, and not a subscription to a lawful game.

Illustration. Hawkins and Batson deposited £50 each with Newman under an agreement that the £100 should be paid to Hawkins if his horse trotted eighteen miles in an hour, and to Batson, if he did not. Newman decided in favour of the horse, and Batson, before the money was paid over, demanded a return of his £50 from Newman. (a)

§ *Securities given for a gaming debt*, are given for an *illegal consideration*, and are *void* as between the original parties, (b) and money paid on them may be recovered. (c)

[NOTE. All games were lawful at common law, but on the petition of "The bowyers, fletchers, stringers and arrowhead-makers," 33 Hen. 8, c. 9, was passed "for the maintaining of artillery," by which a variety of innocent athletic games, such as bowls, quoits and tennis, were made unlawful, in order that young men's attention should not be distracted from the long bow, and the trade of the "bowyers, &c." should be protected. This restriction on games of skill remained in force, though obsolete, until 1845, when it was repealed by 8 & 9 Vict c. 109.

Illegal games. Certain gambling games have been prohibited by various statutes; they are—

- | | |
|-------------------|----------------|
| 1. Ace of hearts. | 5. Roulett. |
| 2. Bassett. | 6. Pharaoh. |
| 3. Hazard. | 7. Dice. |
| 4. Passage. | 8. Lotteries.] |

(a) *Batson v. Newman*, 1 C. P. D. 573.

(b) 5 & 6 Will. 4, c. 41, s. 1.

(c) *Ibid.* sect. 2.

CHAPTER XI.

THE REMEDIES FOR A BREACH OF CONTRACT.

I. *An action for damages.*II. *An action for specific performance of the contract—*

When the receipt of damages does not afford a complete remedy, the court will order the contract to be specifically performed.

For example, where a contract to deliver a cargo of wheat at a certain price is broken, the party injured can go into the market and buy other wheat of exactly the same character, and sue for the difference, if any, between the contract price and the price he had to pay for the wheat in the open market; and the damages he would in this way get would put him in the same position that he would have been in if the original contract had been performed.

But where a contract to sell a particular estate, or a chattel of a peculiar character, is broken, a complete remedy can only be had by a conveyance to the purchaser of that identical estate or chattel, as there is no other exactly like it in the market for him to buy.

Illustration. Bryson, who was a dyer in Spitalfields, and had a particular secret for dyeing bombaseen, agreed with Whitehead to sell him his business and secret. Disputes afterwards arose, and Whitehead refused to complete. The court, on Bryson's application, granted specific performance of the agreement. (d)

III. *Mandamus.* A writ of mandamus to perform a contract will

(d) *Bryson v. Whitehead*, 1 Sim. & St. 74.

be granted where the contract involves the performance of a duty, in which the public at large, and the plaintiff himself personally, are interested. (a)

Illustration. The commissioners under the Tunstall Improvement Act became indebted to Ward and Son, architects. By a provisional order the commissioners ceased to exist, and their property was transferred to the Tunstall Local Board, who were empowered to satisfy all debts contracted by the commissioners, out of such transferred property, and to charge any deficiency on the rates. There was a deficiency, and the Wards sued the board (in the name of their clerk), claiming a *mandamus* to compel the board to raise a rate to satisfy their claim. It was held that they were entitled to have the writ to issue. (b)

IV. *An injunction* to restrain the breach of a contract will be granted, where there is an agreement to *abstain* from doing a particular thing. (c)

Illustration. Dr. Martin and Lady Arabella Howard, his wife, had a house near the parish church of Hammer-smith, and were greatly disturbed by the ringing of a five o'clock bell. They agreed with the vestry to build a cupola, and erect a clock to the church, on the terms that the bell should no longer be rung. The cupola was built, and the clock erected, and the bell ceased to ring. After two years, one Nutkin became churchwarden, and started the bell again, upon which an injunction was sought, and granted, to restrain the vestry from ringing the bell in breach of the agreement. (d)

(a) Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 68.

(b) *Ward v. Lowndes*, 28 L. J. Q. B. 265.

(c) Cf. Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 79.

(d) *Martin v. Nutkin*, 2 P. Wms. 266.

CHAPTER XII.

CONTRACTS WHICH MUST BE UNDER SEAL.

[A DEED must be—

1. *In writing*, to express the contents.
2. *Sealed* with the seal of the parties, to express their consent.

[NOTE. Signing is not necessary. (e)]

3. *Delivered* to the party, in whose favour it is made, to make it binding or perfect.

[NOTE. If delivered to a stranger until certain conditions be performed, and afterwards to be delivered to the party, to whom it is made, it is called an “*escrow*”; that is “a mere writing,” *escriver*.]]

- I. *An executory promise with no consideration* must, in order to be valid, be made by deed. For if Jones promises by parol to paint Smith’s portrait for nothing, Smith cannot enforce the contract. But if Jones has covenanted to do so in a deed he will be bound.

- II. *A gift, if there has been no transfer of the thing given.* For if not made by deed it can be revoked at will.

- III. *Feoffments.* (f) That is, grants of land in fee simple by the delivery of seizin and possession of what is given.

- IV. *Grants and transfers of land* must, at common law, be made by deed.

- V. *Grants and transfers of incorporeal hereditaments.* As, a right of common, a seignory, or a rentcharge, must at common law be made by deed.

- VI. *Exchanges of land.* (f) That is, the mutual granting of equal interests, the one in exchange for the other.

(e) Shep. Touch. 56.

(f) 8 & 9 Vict. c. 106, s. 3.

- VII. *Partitions of land.* (a) That is, the dividing the lands of joint-tenants, tenants in common, and co-parceners, so that they may each hold their own in severalty.
- VIII. *Surrenders of land.* (a) That is, the yielding up of land and the estate a man has therein to another, who has a higher and greater estate in the same.
- IX. *Assignments of leaseholds.* (a).
- X. *Leases* which are required to be in writing by sect. 1 of the Statute of Frauds (see Appendix). That is, leases for a longer period than three years. (a)
- XI. *Transfers of patent rights.* For, what can only be created by deed, can only be transferred by deed.
- XII. *Transfers of ships and shares of ships* must be made by bill of sale, by the Merchant Shipping Act, 1854. (b)
- XIII. *Transfers of shares in* joint stock companies incorporated by Act of Parliament, by the Companies Clauses Consolidation Act, 1845. (c)
- XIV. *Contracts with an urban sanitary authority*, if over £50 in value, by the Public Health Act, 1875. (d)
- XV. *Mortgage debentures* issued by land companies, by the Mortgage Debenture Acts, 1865, 1870. (e)
- XVI. *A power of attorney to execute a deed.* That is, an authority to another to execute a deed as agent.
- XVII. *Contracts made by a corporation.* For the only means a corporate body has of authenticating its contracts is by affixing its seal.

Illustration. The guardians of Bethnal Green Union advertised for a clerk. One Austin applied, and entered on his duties, which consisted of keeping accounts of a somewhat complicated character. He was very

(a) 8 & 9 Vict. c. 106, s. 3.

(b) 17 & 18 Vict. c. 104, s. 55.

(c) 8 & 9 Vict. c. 16, s. 14.

(d) 38 & 39 Vict. c. 55, s. 174.

(e) 28 & 29 Vict. c. 78; 33 & 34 Vict. c. 20.

shortly afterwards dismissed, and sued the guardians for breach of contract. It was held that, as there was no agreement under seal, he could not maintain his action. (f)

§ EXCEPTIONS—

1. Where power is specially given to a *trading* corporation, by the charter, letters patent, or statute, to which it owes its existence, to enter into contracts *by certain of its own officers*.
2. In the case of corporations, or companies, constituted for the purpose of *trading*, which may enter into all contracts of *ordinary occurrence* in their respective trades, without limit as to amount.

Illustration. The South of Ireland Collieries Company, incorporated under the Companies Act, 1862, for the working of certain collieries, contracted with Waddle for the supply by him to them of a pumping engine and machinery. In an action by the company for not delivering the engine, &c., it was held, that the action was maintainable, although the contract was not under seal. (g)

3. Where the contract is for—
 - (i) The performance of insignificant acts.
 - (ii) Of acts of frequent recurrence.
 - (iii) The carrying out of the very purposes for which such corporations were created.

Illustration. The Imperial Gaslight and Coke Company agreed to supply Church with gas at £12 16s. per annum. Afterwards Church refused to have the gas, and the company sued him for not accepting it.

(f) *Austin v. The Guardians of Bethnal Green Union*, L. R. 9, C. P. 91.

(g) *South of Ireland Collieries Company v. Waddle*, L. R. 3, C. P. 463.

The court held that the company could maintain their action, though the contract was not under seal. (a)

4. Where the consideration is executed, and the corporation have got the benefit of the contract.

Illustration. Nicholson supplied coals to the guardians of the Bradfield Union. The coals were used. It was held that he could sue the guardians for the price of the coals, though the agreement, under which he supplied them, was not under seal. (b)

5. Where one has acted on the faith of a contract with a corporation, which is not under seal, and has incurred expense in so doing.

Illustration. The Corporation of Seaford passed a resolution, by which they agreed to let Crook a piece of foreshore for three hundred years. Crook entered, and built a sea wall and a terrace. Afterwards the corporation gave him notice to quit, and brought ejectment, relying on the agreement not having been under seal. The court restrained the action on Crook's application, and decreed specific performance of the contract. (c)

(a) *Church v. Imperial Gas Company*, 6. A. & E. 846.

(b) *Nicholson v. The Bradfield Union*, L. R. 1, Q. B. 620.

(c) *Crook v. The Corporation of Seaford*, L. R. 6, Ch. 551.

CHAPTER XIII.

CONTRACTS WHICH MUST BE IN WRITING.

1. CONTRACTS WITHIN SECTION 4 AND SECTION 17 OF THE STATUTE OF FRAUDS. (d)

1. *Contracts to charge executors and administrators on any special promise to answer damages out of their own estate.* (e)

[Such a contract would be anyhow void as a "*nudum pactum*," unless there were some consideration to support it.]

2. *Contracts to answer for the debt, default, or miscarriage of another.* (e) These are contracts in the nature of a guarantie. (See *post*, Book II. Chap. VI.)

3. *Contracts in consideration of marriage.* (e) This does not apply to a promise to marry between principals. (See *post*, Book II. Chap. VIII.)

4. *Contracts for the sale of interests in land.* (e) This means any contract (not operating as a transfer) which relates to the sale of any interest in land.

For example. An agreement to assign, grant, or surrender a lease; an agreement for the sale of "*fructus naturales*" before severance from the soil.

Illustration. Mrs. Cocking agreed with Ward, in consideration of £100, to surrender her tenancy of a farm to the landlord, and to prevail on him to accept Ward as his tenant in her place. This was held to be an agreement for the sale of an interest in land within the meaning of the statute. (f)

(d) 29 Carl. 2, c. 3. [See the statute at length in the Appendix.]

(e) Sect. 4.

(f) *Cocking v. Ward*, 15 L. J. C. P. 245.

5. *Contracts which are primâ facie not to be completed within a year. (a)*

Illustration. Messrs. Boydell brought out an illustrated edition of Shakespeare in eighteen numbers, two of which, at least, were to come out annually. Blundell agreed to take in the numbers; received, and paid for the earlier numbers as they came out, and then refused to take any more. In an action by Boydell for breach of contract, it was held, that as no agreement in writing was proved, Blundell was not bound to take the subsequent numbers. (b)

6. *Contracts for the sale of goods of the value of £10 and upwards.*

The contract must be in writing, whether the goods are in existence at the time of the making of the contract or not. (d)

EXCEPT—

- (i) In cases (1), (4), (5), and (6), where the consideration is executed.

Illustration. Bluett had some illegitimate children by Knowlman, and agreed with her verbally to pay her £300 per annum, so long as she should maintain and educate them. At Michaelmas, 1870, he discontinued his payments, but she continued the maintenance and education of the children as before. In May, 1873, she sued Bluett for two-and-a-half years' arrears, and the Court held, that as the consideration was executed, the statute did not apply, and she was entitled to recover. (e)

(a) Sect. 4, and *per* HAWKINS, J., in *Davey v. Shannon*, 4 Ex. D., 81.

(b) *Boydell v. Blundell*, 11 East, 154.

(c) Sect. 17.

(d) 9 Geo. 4, c. 14, s. 7. Lord Tenterden's Act.

(e) *Knowlman v. Bluett*, L. R. 9, Ex. 307.

(ii) In case (6) where the buyer

1. Accepts, and

2. Actually receives

a part of the Goods. (f)

[§ ACCEPTANCE MAY BE—

1. *Actual.* That is with the intention of taking possession as owner.

a. *Illustration.* Bistoli, a foreigner, bought at an auction some jewelry. When knocked down to him, he held it in his hands a few minutes, and handed it back to the auctioneer, saying he had been mistaken as to the value. In an action for not accepting the jewelry, the defendant pleaded the Statute of Frauds, and the above facts were put forward as evidence of an acceptance and receipt, sufficient to take the case out of the operation of the statute. The Court held, that it was a question for the jury, whether there had been an actual acceptance by Bistoli, with an intention of taking possession as owner. (g)

b. Gardner bought goods of Grout. After the sale he went to Grout's warehouse and got samples out of the bulk of the goods bought. The samples were weighed and entered against him in Grout's book. Grout refused to complete the sale, and in an action by Gardner for not delivering the goods, the Court held the above facts to have been an acceptance of a part of the

(f) Sect. 17.

(g) *Phillips v. Bistoli*, 2 B. & C. 511.

goods, sufficient to destroy Grout's defence under the statute. (a)

2. *Constructive*. Where the vendee has exercised some dominion over the goods.

a. *Illustration*. Rogers bought a stack of hay of Chaplin, and then resold part of it. He was held to have done an act inconsistent with a right of property continuing in the vendor, and to have accepted the hay within the meaning of the statute. (b)

β Brengeri bought a carriage of Beaumont, a coachbuilder; he ordered certain alterations to be made, and then sent for and took a drive in it, saying he intended to take it out a few times, as he wanted it to pass for a second-hand carriage for purposes of exportation. He afterwards refused to take it; and, in an action by Beaumont, it was held that, by assuming to deal with it as his own, he had accepted it. (c)

§ *ACTUAL RECEIPT*. Where the vendor has parted with the possession of the goods, and placed them under the control of the vendee.

§ There is also what may be somewhat paradoxically called

“*Constructive actual receipt*.”

1. Where the vendor retains the possession of the goods, but under an altered character, so that he has lost his right of lien over them.

Illustration. Elmore, a livery stable keeper,

(a) *Gardner v. Grout*, 2 C. B. N. S. 340.

(b) *Chaplin v. Rogers*, 1 East, 192.

(c) *Beaumont v. Brengeri*, 5 C. B. 301.

sold to Stone a pair of horses. Stone told him he had no place to put them in, and Elmore must keep them at livery for him. Elmore transferred them from his sale stable to his livery stable. In an action by Elmore for the purchase-money, it was held that, the above facts shewed a delivery to, and a receipt by, Stone; and that Elmore had lost his lien on the horses, his character of vendor being changed to that of agent for the purchaser. (*d*)

2. Where the goods are in the possession of the vendor's agent, there will be a receipt by the vendee as soon as the agent has "attorned" to him; that is, recognised him as owner.

Illustration. Burn bought a hogshhead of wine of Baker and Farnley, which was lying in the London Docks, and received from them a delivery order and invoice. He lost the delivery order, and refused to pay for the wine. In an action by the assignees in bankruptcy of Baker and Farnley for the price, it was held, that there could be no actual receipt of the wine by Burn until the delivery order had been accepted by the dock company, or the latter had consented to hold the wine for him. (*e*)

- (iii) Also in case (6) where the vendee gives something in earnest to bind the bargain, or in part payment. (*f*)

[Any sum so paid however small will suffice.]

(*d*) *Elmore v. Stone*, 1 Taunt. 158.

(*e*) *Benthall v. Burn*, 3 B. & C. 423.

(*f*) Sect. 17.

- (iv) In all the cases where there is a *memorandum in writing* of the agreement or bargain. (a)

§ **ESSENTIALS OF THE WRITTEN MEMORANDUM.** It must contain,—

1. The names of the parties.

Illustration. Williams undertook to build certain cottages for William Owens and John Thomas, who handed him a guarantie of Thomas Lake, in the following terms:—

“Sir, I beg to inform you that I shall see you paid to the sum of £800 for the ensuing building, which you undertake to build for Messrs. Thomas and Owens of Caploch.

“I am, yours, &c.,

“THOMAS LAKE.”

This, in an action on the guarantie, was held not to be an agreement, inasmuch as the name of Williams, the other party to the contract, did not appear therein. (b)

2. The subject matter.
3. All the material terms, so that the question is not left in doubt.

Illustration. Sir John Bailey was in treaty with the Hon. Mr. Fitzmaurice for a lease of a house and stables, which were held by Fitzmaurice for two different terms of years. Letters passed between the parties, embodying some of the terms of the contract, but no mention was made of the commencement or duration of the lease of the stables. In an action by Fitzmaurice for not completing, it was held that these were material points, the omission of which was fatal to the validity of the agreement. (c)

4. (a.) The consideration, *under section 4*, [except in the case of a guarantie; where, it is now made unnecessary by section 3 of the Mercantile Law Amendment Act,

(a) Sects. 4 and 17.

(b) *Williams v. Lake*, 29 L. J. Q. B. 1.

(c) *Fitzmaurice v. Bailey*, 9 H. L. C. 78.

1856. (*d*) This provision was passed in consequence of the decision in the accompanying illustration, which is still, however, an authority in respect of all other contracts within the Statute of Frauds.

Illustration. Wain & Co., forbore to sue one Hall, in consideration of which Warlters promised to pay them some £56, the amount due from Hall to them. The promise was in writing, but no mention was made of the consideration of the guarantie. It was held that the plaintiffs could not recover. (*e*)]

(*β*.) The price, *under section 17*. If the price has been agreed upon. Otherwise a *reasonable* price will be implied.

Illustration. Hoadly, a coach-builder, contracted in writing to build Sir Archibald McClaine a carriage. No agreement was come to about the price. When the carriage was sent home, Sir Archibald refused to accept it, as the price demanded was over £480. In an action by Hoadly for not accepting the carriage, the Court held that the law would imply that a reasonable price was to be paid. (*f*)

5. The signature of the party to be charged, or that of his authorized agent. (*g*)

[This need not be at the end of the document, so long as it clearly governs the whole agreement.

Illustration. An agreement beginning, "I, James Crockford, agree to sell, &c.," was held to be sufficiently signed to satisfy the statute. (*h*)]

[**NOTE.** Several documents may be read together in order to constitute the memorandum, so long as the connection between them is apparent from

(*d*) 19 & 20 Vict. c. 97, s. 3.

(*e*) *Wain v. Warlters*, 5 East. 10.

(*f*) *Hoadley v. McClaine*, 4 M. & Sc. 340.

(*g*) Sects. 4 and 17.

(*h*) *Knight v. Crockford*, 1 Esp. 191.

the documents themselves ; and parol evidence is not required to show such connection.

Illustration. The following sale-note was sent by the vendors to one Sanderson, unsigned.

“Bought of Jackson & Hankin, distillers,
No. 8, Oxford Street, 1,000 gallons of
gin ; 1 in 5 gin, 7s. £350.”

And subsequently they wrote him a letter asking for directions, as to delivery, signed, “Jackson & Hankin.” It was held that the two documents referred sufficiently to one-another, so as to be read together without parol evidence being necessary to explain their relation ; and, consequently, that they together formed a binding contract. (a)]

II. *A representation as to character.*

[See *post*, Book III. Part VI. Chap. II., and 9 Geo. 4, c. 14, s. 6.

III. *An acknowledgement of a debt, which will bar the Statute of Limitations.*

[See *ante*, p. 15; and

9 Geo. 4, c. 14, s. 1.

3 & 4 Will. 4, c. 42, s. 5.

3 & 4 Will. 4, c. 27, ss. 14, 42.

37 & 38 Vict. c. 57, s. 8.

IV. *A consent to the enjoyment of a servitude, which will prevent the operation of the Prescription Act, 1832. (b)*

For example. Twenty years uninterrupted enjoyment of a right to the access of light gives an indefeasible title, unless it appears that it was enjoyed under a written consent.

(a) *Saunderson v. Jackson*, 2 B. & P. 238. See also *Ridgway v. Wharton*, 6 H. L. C. 238 ; *Baumann v. James*, L. R. 3 Ch. 508 ; *Long v. Miller*, 4 C. P. D. 450 ; *Stewart v. Eldon*, L. R. 9 C. P. 311.

(b) 2 & 3 Will. 4, c. 71, ss. 1, 2, 3.

V. *Agreements between master and servant as to deductions from wages, in respect of certain matters under the "Truck Acts."*

[1 & 2 Will. 4, c. 37, s. 23.]

VI. *Special contracts with railway companies for the carriage of animals and goods.*

[See *post*, Book II. Chap. V., and 17 & 18 Vict. c. 31, s. 7.]

VII. *The acceptance of a bill of exchange.*

[See *post*, Book II. Chap. IX, and 19 & 20 Vict. c. 97, s. 6.]

VIII. *Agreements as to costs between solicitor and client.*

[33 & 34 Vict. c. 28, s. 4.]

IX. *Agreements between husband and wife that the wife's property before marriage shall be held to her separate use.*

[See *ante*, p. 9, and 33 & 34 Vict. c. 93, s. 11.]

X. *Special contracts between pawnor and pawnee, where the loan is over 40s.*

[Pawnbrokers Act, 1872, 35 & 36 Vict. c. 93, s. 24.]

CHAPTER XIV.

OF TORTS GENERALLY. (*a*)

§ A **TORT** is an injury of which the law takes notice, proximately resulting in damage capable of legal estimation.

§ A **TORT** CONSISTS OF—

I. *A wrongful act.* That is—

1. Either the infringement of a right, viz.:

- (i) The right of personal security.
- (ii) The right of personal liberty.
- (iii) The right of personal character.
- (iv) The right of private property.

2. Or, the breach of a duty.

II. *Damage.* That is—

1. Either *actual* pecuniary damage.

2. Or *legal*, that is, *implied* damage. [The damage which the law *imputes*, as the result of *every infringement of a right*.]

Hence an action can be maintained for the infringement of a right (except in certain cases of slander, see *post*, Book III. Part V. Chap. V.), without proof of actual damage, and for a breach of a duty, only when actual damage is proved.

§ **MERE DAMAGE**, however great, will not support an action where there has been—

- 1. Neither the infringement of a right (*b*)
- 2. Nor the breach of a duty.

Illustration. The Commissioners of Sewers of the levels

(*a*) See the chapter on *Rights of Action*, *ante*, p. 3.

(*b*) *Chasemore v. Richards*, see *ante*, p. 3; *Wood v. Waud*, *post*.

of Pagham, in Sussex, erected certain groynes to protect the levels from the inroads of the sea. These groynes caused the sea to flow with greater violence against, and so to injure, the adjoining lands of King. King sued the commissioners for compensation; but the court held that they had committed no wrongful act; as every man has a right to protect his own, and there is no duty cast upon him to protect his neighbour's land from the common enemy. (c)

§ **TORTS FOUNDED ON CONTRACT** are where a contract imposes a duty, and there has been a breach of that duty.

For example. Where Jones receives goods from Smith to carry them for hire, there is *a contract* between Jones and Smith that the former will carry the goods safely; and also *a duty* imposed upon him to carry them with care. If therefore he loses the goods on the road he may be sued, *at the option of Smith*, either for a breach of the contract, or for negligence in the performance of his duty.

1. *Where the wrongful act amounts to a felony*, the remedy by action is suspended until public justice is satisfied by the prosecution of the offender.
2. *If it only amounts to a misdemeanor*, the party aggrieved may sue immediately. (d)

(c) *Rex v. The Pagham Level Commissioners*, 8 B. & C. 360.

(d) *Reg. v. Hardy*, 14 Q. B. 541.

BOOK II.

OF PARTICULAR CONTRACTS.

CHAPTER I.

CONTRACTS FOR THE SALE OF GOODS.

§ THE title to goods rests *primâ facie* on possession. The possession of goods makes a good title against every one but the true owner.

1. *Where the sale is in market overt.* [That is, in a shop in the city of London, and at any market elsewhere, established either by charter or prescription.]

The purchaser obtains a good title against all the world.

Except. Where the goods have been *stolen* and the thief has been convicted, upon the happening of which the property reverts in the true owner. (a)

[*NOTE.* Where a thief sells during the interval between the act of theft and his conviction, the purchaser, if he sells the goods to another, before the conviction of the thief, is not liable to the true owner.

Illustration. Smith purchased in Smithfield Market eighteen sheep of a salesman named Parrott. They had come into Parrott's possession through one Bateman, who had stolen them from Horwood. Horwood gave notice to Smith of the theft, and demanded the sheep.

(a) 24 & 25 Vict. c. 96, s. 100. "The Larceny Act."

But Smith refused to give them up, and subsequently sold them. After this resale Horwood prosecuted Bateman, who was convicted. Horwood then sued Smith in trover for the sheep, and it was held that he could not recover. (a)]

2. *Where the sale is elsewhere than in market overt.*

(i) If the vendor has stolen the goods, the vendee obtains no title.

(ii) If the vendor has become possessed of the goods wrongfully, the vendee gets no title.

Illustration. Bayes bought a horse at Rea's horse-repository, in Southwark. The horse had been stolen while at grass in the Essex marshes from Lee. Lee brought trover against Bayes for the horse; and it was held that, Rea's repository was not market overt, and that Lee was entitled to recover the horse from Bayes. (b)

(iii) If the vendor has obtained them under a pretended contract, and resells them before the true owner has avoided the contract, the vendee, without notice of the fraud, obtains a good title.

Illustration. Wale bought a flock of sheep of Newington, and paid for them by a cheque on a bank at which he had no account. At Maidstone market (established under a local Act, and not a market overt), he resold them to Moyce, a butcher. Newington subsequently took the sheep out of Moyce's possession, and Wale was convicted of obtaining them by false pretences. Moyce brought an action against Newington for wrongfully depriving him of the sheep, and the Court held that he was entitled to recover. (c)

(a) *Horwood v. Smith*, 2 T. R. 750.

(b) *Lee v. Bayes*, 18 C. B. 599.

(c) *Moyce v. Newington*, 4 Q. B. D. 32.

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158

§ SALE OF GOODS BY FACTORS UNDER "THE FACTORS' ACTS." (e)
(f) (g)

1. *Agents for sale*, to whom *goods* are entrusted or consigned, can make a valid transfer of the same, even in fraud of their principals.

Provided—

- (i) The vendee has no notice that such agent has no authority to sell.

- (ii) The transaction is in the ordinary way of business. (d)

2. *Agents for sale*, entrusted with, and having in their possession, *documents of title* to goods, can make a valid transfer of the same, even in fraud of their principals.

Provided the vendee has no notice that the agent is not the real owner. (e)

3. *Agents for sale*, entrusted with the possession of goods, or the documents of title to goods, can make a valid contract of *pledge* in fraud of their principals.

Provided that the pledgee has no notice that the agent had no authority to pledge. (f)

4. (i) *A vendor* who retains, as against his vendee, possession of documents of title to the goods which have been sold by him; or,

- (ii) *A vendee* who has obtained possession of such documents, as against his vendor, can make a valid *transfer* or *pledge* of the same to a third party.

Provided such second vendee, or the pledgee, has no notice of—

- (i) The previous sale; or

- (ii) The vendor's lien. (g)

I. AN UNCONDITIONAL SALE is the transfer, for a price in money,

(d) 6 Geo. 4, c. 94, s. 4.

(e) 6 Geo. 4, c. 94, s. 2.

(f) 5 & 6 Vict. c. 39, ss. 1, 3.

(g) 40 & 41 Vict. c. 39, ss. 3, 4.

of the right of property in specific chattels, and of the attendant risk.

§ *It is essential to an unconditional sale—*

1. That the specific goods be ascertained,
2. That the price be fixed.

When these two matters are determined, the goods become the property of the vendee, and the loss is his, if they perish.

Illustration. Baxter, on January 4th, 1825, agreed to sell Tarling a stack of hay for £145, the hay to be left standing till the following May. It was so left in Baxter's possession, and was burnt. The Court held, that the property in the hay had passed to Tarling, and the loss was his. (a)

II. A **CONDITIONAL SALE** is the inchoate transfer for a price in money of the right of property in specific chattels, dependent on—

1. The doing of some act by the vendor, which is to put the goods into a deliverable state.

For example. Where Smith agrees to buy of Jones a set of chairs for £15, on condition that Jones first re-covers them, or

2. The weighing or measuring of goods by the vendor, upon the accomplishing of which the price will depend.

Illustration. Hart, Logan & Co. sold to Le Mesurier, Routh & Co. a raft of red pine timber, measuring 50,000 feet, more or less, then lying in the Ottawa river. It was to be paid for before delivery, at the rate of 9½d. per foot *measured off*. An allowance was to be made one way or the other, according as, when measured, it was found to consist of more or less than 50,000 feet, and it was to be delivered at Quebec. As soon as the timber arrived it was broken up by a storm, and a great part of it lost before it was mea-

(a) *Tarling v. Baxter*, 6 B. & C. 360.

sured. Le Mesurier & Co., having paid the price under the contract, sued to recover the same; and it was held that they were entitled to do so, as the property in the timber had not passed to them before it was lost, the transfer of the title being conditional on the final measuring of the timber, which never took place, (b) or

3. The doing of some act by the vendee which is to be a condition precedent to his acquiring a right of property in the goods.

Illustration. Alston bought certain sheep, on the terms that he should drive them home and depasture them for a certain time, and that the vendor during that time should pay him so much a week for their pasture. If Alston then should pay him the price of the sheep he was to have them. The vendor, before the agreed period expired, sold the sheep to Mires. Alston sold them to Marwood. In an action by Mires in trover for the sheep, it was held, that the property in the sheep had never passed to Alston, and that Mires had a good title to the sheep. (c)

§ In these cases neither the right of property nor the risk pass to the vendee until the completion of the condition on which the transfer depends.

§ **AN AGREEMENT FOR A SALE.** There can be no sale, but only an agreement for a sale, when the goods are not specifically set apart.

For example. Where Wilks agreed with Shuttleworth & Co., to sell them twenty tons of oil *out of the stock in his cisterns*, it was held that there was no sale. (d)

§ But as soon as the specific goods have been *selected*, and *appropriated*, and the selection and appropriation *assented*

(b) *Logan v. Le Mesurier*, 6 Moore P. C. 116.

(c) *Mires v. Solebay*, 2 Mod. Rep. 243.

(d) *White v. Wilks*, 5 Taunt. 176.

to by *both* parties, the sale becomes complete, and the goods are at the vendees' risk.

Illustration. Rohde & Co., agreed to sell Thwaites twenty hogsheads of sugar out of a quantity in bulk. Four hogsheads were filled, and delivered; sixteen more were then filled up, and put aside for Thwaites, and notice was given to him to take them away, which he agreed to do. It was held in an action by Rohde & Co. against Thwaites for not taking the remainder, that the sale had been completed, and that the property had passed to the defendant. (a)

§ *The appropriation may be—*

1. The act of the *vendee*; as when he makes the selection, and removes them.
2. The act of the *vendor*, which will be the first active step he takes with reference to the goods in favour of the vendee, after he has selected them.

Illustration. Aldridge agreed with Knight to purchase 100 quarters of barley at £2 3s. 0d. per quarter, out of the bulk in Knight's granary; Aldridge to send sacks, and Knight to fill and despatch them. Aldridge accordingly sent to Knight 200 sacks, each of which would contain half a quarter of barley. Knight filled 155 of them, and applied to the railway for trucks for carrying them. The railway did not supply the trucks, and Knight emptied out the 155 sacks into the bulk of barley in his granary, and filed his petition in bankruptcy five days after. Aldridge sued Knight's assignees for the barley, and it was held, that the property had passed in the barley which had been filled into the 155 sacks, but not in any which had not been put into the remaining sacks. (b)

(a) *Rohde v. Thwaites*, 6 B. & C. 388.

(b) *Aldridge v. Johnson*, 26 L. J. Q. B. 296.

The property in the goods, though they may be appropriated and despatched, may still be retained by the vendor.

1. Either by express reservation,
2. Or by conduct showing an intention to make such a reservation.

Illustration. Josse sold a quantity of coal, part of a heap in his yard, to Pope, for cash, to be shipped on board a vessel, chartered by Pope in his own name and on his own behalf to carry to London. Pope, before the coal was separated from the bulk, sold it to Moakes. Josse shipped the coal, and took three bills of lading, making it deliverable to Pope's order. Only one of the bills of lading was stamped, and this Josse kept; sending on the second with the invoice to Pope. Josse, being unable to get the price out of Pope, sent the stamped bill to Nicholson, his agent, who got possession of the coal. Moakes sued Nicholson in trover for the coal, and it was held that Moakes had no better title than Pope, his vendor; and that no title had passed to Pope from Josse, as the retention of the stamped bill of lading, *was a clear indication of his intention to reserve* his right of property in the coal. (c)

§ **DELIVERY.** In the absence of any agreement to the contrary, the vendor will have done all that is required of him, when he has placed the goods at the disposal of the vendee.

§ He must deliver neither more nor less than what has been purchased.

Illustration. Mills ordered a dozen of wine of Hart. Four dozen were sent. It was held that Mills was entitled to send them all back. (d)

(c) *Moakes v. Nicholson*, 34 L. J. C. P. 273.

(d) *Hart v. Mills*, 15 M. & W. 85.

§ THE VENDEE HAS A RIGHT OF IMMEDIATE POSSESSION.

1. If the goods are sold *for cash*, on tender of the price.

§ *Lien*. Until tender of the price has been made, the unpaid vendor has *a right of lien* over the goods; that is, he may retain possession of them against the price.

[NOTE. A right of *lien* gives the unpaid vendor no right to sell.]

2. If *on credit*, as soon as the bargain is struck, without reference to payment. The vendor's right of *lien* being *waived*.

Defeasible by the vendee becoming insolvent before he gets possession, when the vendor's *right of lien* *revives*, and *is exercised* by—

- (i) The vendor's refusal to part with the goods if they are still in his possession.

Illustration. Sanders & Co. sold eight pockets of hops to Saxby at £7 15s. 0d. The hops were not paid for. After a portion of them had been delivered, Saxby became bankrupt. In an action in trover for the remainder of the hops by Saxby's assignees, it was held, that Saxby's right of possession to the undelivered portion of the hops was rescinded by his becoming insolvent. (a)

- (ii) The vendor countermanding the delivery order, if the goods are in the hands of his bailee.

Provided The goods have not been resold, nor the sub-purchaser attorned to by the bailee.

Illustration. Messrs. Smith & Co., by their agent, Alexander, warehoused certain sugars with Messrs. Little & Co., at Greenock. Smith & Co. sold the sugar to Bowie & Co., and gave them a delivery order on Alexander. Bowie & Co. sold to Messrs. McEwan & Sons, who produced

(a) *Bloxam v. Sanders*, 4 B. & C. 941.

to Alexander's clerk the original delivery order, and received in exchange a slip with these words :—"Delivered to the order of Messrs. McEwan & Sons, this date, 42 hogsheads of sugar ex St. Mary. Jas. Alexander, per J. Adams." In the meantime Smith & Co., finding Bowie & Co. insolvent, ordered Alexander not to deliver the sugar, and he removed it to another warehouse. In an action by McEwan & Sons for the Sugar, the House of Lords held, that Alexander not being in possession of the goods had no authority to deal with them; and, as Messrs. Little had never attorned to the plaintiffs, Smith & Co. retained their lien. (*b*)

(iii) § The vendor countermanding the delivery order, when the goods are in the hands of his carrier; upon which the goods revert in the vendor.

§ The right to counter-order the delivery in such a case is called "the right of stoppage *in transitu*."

§ The *transitus* lasts until the whole of the goods come into the actual possession of the vendee, or of his agent for deposit.

Illustration. Crawshay & Co., delivered 348 bars of iron to Eades, a barge-owner, to carry to Hornblower at Stourbridge. Eades landed a part of the iron at Hornblower's wharf, and then, hearing he had absconded, delivered no more, and reshipped what had been landed. He then sold a portion of the iron to repay himself a debt due from Hornblower, and delivered the residue to Hornblower's assign-

(*b*) *McEwan v. Smith*, 2 H. L. C. 309.

nees. In an action by Crawshay & Co. against Eades for converting the iron, it was held that they were entitled to recover, for the right to stop *in transitu* continued until delivery was completed, and the property in the iron had not passed to Hornblower, but remained in Crawshay & Co. (a)

(a) *Crawshay v. Eades*, 1 B. & C. 181.

CHAPTER II.

FRAUDULENT SALES OF CHATTELS.

§ FRAUDULENT SALES OF CHATTELS.

§ All sales of goods and chattels, made with the intention of hindering, delaying, or defrauding creditors, are fraudulent and void, as against the creditors. (*b*)

§ The question of fraud, or no fraud, is for the jury.

§ Chattels are frequently conveyed and mortgaged by bill of sale, and are left in the possession of the assignor. In consequence of which the latter obtains a fictitious credit, through being held out to the world, as owning what really belongs to another. The legislature, with the view of securing notoriety to all transfers of chattels, where the vendee does not at once remove his purchases, has passed the Bills of Sale Acts—

17 & 18 Vict. c. 36.

29 & 30 Vict. c. 96.

41 & 42 Vict. c. 31.

The first two of these statutes are only in force in relation to bills of sale executed before January, 1879, as the 41 & 42 Vict. repeals them from that date. And bills of sale executed after January, 1879, are governed by the latter statute.

§ A BILL OF SALE under these Acts of Parliament is void as against trustees in bankruptcy and execution creditors.

In cases where the chattels conveyed remain for more than (by the old Act twenty-one days), by the Act of 1878, seven days after the execution of the bill of sale in the possession, or apparent possession, of the assignor. (*c*)

(*b*) 13 Eliz. c. 5 ; 29 Eliz. c. 5.

(*c*) 17 & 18 Vict. c. 36 ; 41 & 42 Vict. c. 31, s. 8.

Illustration. Coundon, a seafaring man, had some furniture at No. 5, Nelson Street, Sunderland. He gave Robinson a bill of sale over it to secure an advance of £250, and went to sea. His wife then removed the furniture to two rooms in No. 12, Ward Street, and went to live with her daughter-in-law. Coundon returned in two years time, and joined his wife at the daughter-in-law's. Robinson demanded the furniture, and Coundon directed his wife to deliver to him the keys of No. 12, Ward Street. This was done, and Robinson locked up the house, but did not remove the furniture. Next day the sheriff put in an execution on a judgment obtained against Coundon, and seized the furniture. The bill of sale was not registered. It was held that the bill of sale did not require registration, as Coundon not being a *de facto* occupier of No. 12, Ward Street, the goods were not in his *apparent* possession. (a)

UNLESS—

(i) Within (by the old Act twenty-one days), by the Act of 1878, seven days of such execution there be registered in the Queen's Bench—

1. A true copy of the bill of sale, with its schedules and inventories annexed. (By the old Act the bill of sale, &c., itself.)

2. An affidavit declaring—

(a.) The time of the execution of the bill of sale.

*(β.) Its due execution and attestation.

(γ) A description of the residence, and occupation of the assignor, and the attesting witness. (b)

*[This is only required under the Act of 1878.]

(a) *Robinson v. Briggs*, L. R. 6, Ex. 1.

(b) 41 & 42 Vict. c. 31, s. 10.

- (ii) The bill of sale be re-registered every five years.
 - (iii) The bill of sale be attested by a solicitor. (c)
 - (iv) The attestation states that, before execution, the attesting solicitor had explained to the grantor the effect of the bill of sale. (c)
 - (v) The consideration is set forth in the bill of sale. (d)
-

(c) 41 & 42 Vict. c. 31, s. 10.

(d) 41 & 42 Vict. c. 31, s. 11.

CHAPTER III.

OF A SALE OF GOODS WITH A WARRANTY, ON A
CONDITION PRECEDENT, AND BY FRAUDU-
LENT REPRESENTATIONS.

1. **A WARRANTY** is a collateral promise appended to a contract of sale, either—

- (i) Expressly, or
- (ii) Impliedly.

§ Failure of the warranty does not entitle the vendee to treat the sale as void, to return the thing bought, and demand back the price paid. He must keep his purchase, and bring his action for damages on the warranty.

For instance. If Jones sells Smith a horse, and warrants him sound, and the horse turns out to be spavined, the sale of the horse is a good sale. It is the collateral promise that he is sound which has been broken. Smith therefore cannot return the horse; his remedy is on the warranty.

1. **AN EXPRESS WARRANTY** is an assertion, in terms, of a fact, of which the purchaser is ignorant; and is confined to that fact.

Illustration. Gupp sold Dickenson a horse, and gave him a receipt in the following terms: "Received £100 for a bay gelding got by 'Cheshire Cheese;' warranted sound." This was held to be an express warranty as to his soundness only; and not as to his parentage. (a)

2. **AN IMPLIED WARRANTY** is a promise, which, from the nature

(a) *Dickenson v. Gupp*, quoted in *Budd v. Fairmaner*, 8 Bing. 48.

of the transaction, the law imputes to the vendor, at the time of the contract of sale.

- (i) *There is an implied warranty that the goods are the vendor's, when he sells as owner.*

Illustration. Eichholz went to the warehouse of Bannister, a "job-warehouseman," in Manchester, and bought and paid for certain pieces of print, which Bannister said were a job lot, just received by him. After the goods were delivered, it turned out they had been stolen, and had to be given up to the owner. In an action by Eichholz to recover the price, it was held that there had been an implied warranty of title, on the sale by Bannister, who by his conduct must be taken to have affirmed that the goods were his. (b)

- § *But when he sells in any particular capacity, other than owner, [for instance, as sheriff, pawnbroker, or agent] he only warrants that he does not know of any defect in his authority to sell*

Illustration. One, Poley, hired a harp of Messrs. Chappell, and pledged it with Attenborough. The latter in due course sold the harp at auction, as an unredeemed pledge to Morley. Subsequently Chappells claimed, and took the harp from Morley, who sued Attenborough for breach of warranty of title. It was held that all that Attenborough had undertaken was, that the harp was an irredeemable pledge, and that he was not cognizant of any defect of title in it. (c)

- (ii) *There is an implied warranty, when the vendor gives a description of goods, and the vendee is not in a position to inspect them, that the goods are merchantable, and fairly answer the description given.*

(b) *Eichholz v. Bannister*, 34 L. J. C. P. 105.

(c) *Morley v. Attenborough*, 3 Ex. 500.

Illustration. Jones & Co. of Liverpool purchased of Just a quantity of Manilla hemp, to arrive from Singapore by certain ships. On delivery it was found that the hemp was damaged by salt water. It had not lost the character of hemp, but was unmerchantable. Jones & Co. sold the hemp at a loss of £25 per cent., and sued Just for the deficit. It was held, that there was an implied warranty on Just's part to supply Manilla hemp of the quality of which the bales originally consisted, in a merchantable condition. (a)

- (iii) *When the vendor has notice that the article bought is to be used for a particular purpose, there is an implied warranty that it is fit for that purpose.*

Illustration. Edgington was a rope dealer. Brown sent to his shop for a crane-rope. Edgington's foreman measured the crane, and was told that the rope was required for raising pipes of wine. A rope was supplied, but when in use, broke with the weight of one of the casks. In an action by Brown for the value of the wine, it was held that Edgington had warranted the rope to be fit for the purposes to which he knew it was to be put, and that he was liable. (b) *Brown v. Edgington*, 5 Q. B. 213.

Unless the article sold is a *known, described, and defined* article.

Illustration. Chanter had invented and manufactured a patent smoke consuming furnace. Hopkins ordered one for his brewery. When fixed, it was found not to suit his brewing copper. In an action by Chanter for the price of the apparatus, it was held that all Chanter had contracted

(a) *Jones v. Just*, L. R. 3 Q. B. 197.

(b) *Brown v. Edgington*, 2 Sc. N. R. 496.

to do was to supply one of his patent smoke consuming furnaces ; that there was no warranty that it would consume smoke, and that the defendant having got what he had contracted to buy was bound to pay for it. (c)

- (iv) *Where the vendor manufactures an article for a specific purpose, there is an implied warranty that it is reasonably fit for that purpose.*

Illustration. Newson was a coach-builder. Randall ordered and bought of him a pole for his carriage. The pole broke, and the horses were injured. In an action by Randall for the value of the pole, and for the damage done to the horses, it was held that Newson must be taken to have warranted the pole, and was liable, although there was a latent defect in the pole, which he could not have discovered. (d)

- (v) *There is an implied warranty in a sale by sample, that the bulk fairly corresponds with the sample.*

Illustration. Parker & Co. sold Palmer a quantity of East India rice. The contract contained the words "per sample." Palmer subsequently refused to accept the rice, as after-drawn samples did not correspond with those originally taken. In an action by Parker & Co., it was held that in a sale by sample, the vendor warrants that the bulk shall answer to the description of a small parcel exhibited at the time of the sale. (e)

- (vi) *There is NO implied warranty as to quality, but the maxim "CAVEAT EMPTOR" (buyers beware) applies, where the vendee has an opportunity of inspecting the goods, and buys on his own judgment.*

- (a.) *Illustration.* Mathews was a meat salesman in New-

(c) *Chanter v. Hopkins*, 4 M. & W. 399.

(d) *Randall v. Newson*, 2 Q. B. D. 102.

(e) *Parker v. Palmer*, 4 B. & Ald. 387.

gate Street. Emmerton, a butcher, saw a carcase, which appeared to be good meat, exposed for sale, and bought it of him on his own inspection. When cooked, it turned out to be unfit for human food. In an action by Emmerton it was held that as he bought the meat on his own judgment, there was no implied warranty on Mathews' part. (a)

(β.) *Illustration.* Parkinson, a hop-dealer, bought of Lee, another hop-dealer, five pockets of hops. The sale was by sample, with a warranty, that the bulk was up to sample, but with no further warranty as to the quality. On the hops turning out to have been fraudulently watered, (but not to the knowledge of Lee) and unsaleable, Parkinson sued Lee for a breach of an implied warranty of the quality of the hops; but the court held that the plaintiff bought on his own judgment, and should have required an express warranty if he intended to guard against a latent defect, and that there was no implied warranty in such a case. (b)

II. A *CONDITION PRECEDENT*. A contract of sale may depend on conditions, the due performance of which is incumbent on the vendor, before the liability of the vendee attaches. *For example.* Where Jones agrees to ship a cargo on board Smith's ship, provided the ship is alongside the wharf on a certain day.

§ Where a condition precedent remains unperformed, the vendee may repudiate the whole contract, return the goods delivered under it, and sue for the price of them back again if paid.

1. *Express conditions precedent* are where the parties have in terms stipulated that the contract shall depend on the existence or the happening of certain matters.

(a) *Emmerton v. Mathews*, 31 L. J. Ex. 139.

(b) *Parkinson v. Lee*, 2 East, 314.

Illustration. Bannerman had some hops for sale. White inquired of him whether sulphur had or had not been used in their growth; and on being assured that it had not, bought them. It afterwards appeared, that the hops, unknown to Bannerman, had been sulphured; and White repudiated the contract. In an action by Bannerman for the price of the hops, it was held that White bought upon the terms that no sulphur had been used in dealing with the hops, and that this was a condition precedent to his being obliged to take them. (c)

2. *Implied conditions precedent* are those, which, from the nature of the case, the law imports into the contract.

Illustration. Young was a stock breker, and was employed by Cole to sell for him some Guatemala bonds. Young did so, and paid Cole the price, receiving delivery from Cole of four *unstamped* Guatemala bonds, which had been repudiated by the Guatemala government, and were valueless. Neither party knew that a stamp was necessary. Young, on discovering the nature of the bonds delivered, sued Cole for the price he had paid him; and it was held that Cole was bound to refund it, as the contract being for the sale of real Guatemala bonds, the bonds delivered were worthless paper, and it is a condition precedent to every contract, that the thing delivered should correspond with the thing agreed to be sold. (d)

- III. **FRAUDULENT REPRESENTATIONS.** (See also *ante*, p. 30, and *post*, Book III. Part VI. Chap. II.) A representation is a statement by one party made before, or at the time of the contract, by which the other party is induced to enter into the contract; but which is not an integral part of the contract itself.

(c) *Bannerman v. White*, 31 L. J. C. P. 28.

(d) *Young v. Cole*, 3 Bing. N. C. 724.

§ The fact of a representation being *untrue* will not entitle the party influenced by it to avoid the contract.

Illustration. Hopkins bought a horse named "California," of Tanqueray at auction at Tattersall's. The day before the sale, while Hopkins was examining the horse, Tanqueray said to him, "You have nothing to look to, I assure you he is perfectly sound in every respect." On which Hopkins replied, "If you say so, I am perfectly satisfied;" and examined the horse no further. The horse turned out to be unsound: but Tanqueray was not aware of this when he made the above representation. Hopkins sued Tanqueray to recover a loss on the resale of the horse. It was held that what was said by the defendant was a representation, and no warranty; and as he made it in ignorance of the fact, there was *no fraud*, and the plaintiff was not entitled to recover. (a)

§ *If the representation be false TO THE KNOWLEDGE OF THE PARTY MAKING IT, this is fraud*; and the party induced to enter into a contract on the faith of such false representation, is entitled at once to repudiate the contract, to return any goods delivered, and sue for any price paid under it; if he can restore the goods to the defendant in the state in which they were delivered to him.

Illustration. Atherton's traveller sold to Udell a log of mahogany, and warranted it sound, knowing that it was defective. On cutting the log in two, the defect became apparent, and Udell brought his action against Atherton for deceit. The court held that the defendant was liable for the fraud of his agent, and that the plaintiff would have been entitled to rescind the contract, had he not deprived himself, by cutting it in two, of the power to restore the log to the defendant in its original state. (b)

(a) *Hopkins v. Tanqueray*, 23 L. J. C. P. 162.

(b) *Udell v. Atherton*, 30 L. J. Ex. 337

§ A sale "*with all faults*," will none the less be made on a fraudulent representation, if any contrivance has been resorted to, to conceal a defect.

Illustration. Heath was owner of an unseaworthy vessel, whose hull was wormeaten, and keel broken. He removed her from the ways, where she lay dry, and kept her afloat in deep water, and then issued an advertisement for her sale, which described her hull as being nearly as good as when launched, but said she was to be taken "*with all faults*." In an action by Schneider, the purchaser of the vessel, it was held that the defects in the vessel having been purposely concealed, the vendors were not protected by the stipulation that she was to be sold "*with all faults*," as that expression does not mean "*with all frauds*." (c)

(c) *Schneider v. Heath*, 3 Camp. 508.

CHAPTER IV.

CONTRACTS FOR WORK AND LABOUR.

I. **MASTER AND SERVANT.** The contract between master and servant is a mutual engagement, express or implied.

1. On the part of the one, to employ and remunerate.
2. On the part of the other, to serve.

§ *Where the service has been performed*, in the absence of any express contract, the law presumes—

1. A hiring.
2. For reasonable or customary wages.

Unless the service is done for some near relative, as by a son for his father, in which case the presumption is the other way.

§ *Where annual wages are reserved*, or the contract is for an indefinite time, the hiring is a yearly one.

§ *Notice* on either side must be (i) reasonable, or (ii) customary; terminating with the current year of service, in analogy with notice under a yearly tenancy. (See *post*, Book II. Chap. X.)

Illustration. Beeston was clerk to Collyer, an army agent, and served him from March 1st, 1793, at a salary, paid quarterly, till December 23rd, 1826, when Collyer dismissed him. In an action by Beeston, it was held that the contract was a hiring for a whole year, and afterwards as long as the two should please, until the expiration of any current year from March the 1st. (a)

§ The hiring of a *domestic* servant is an annual one, defeasible,

(a) *Beeston v. Collyer*, 4 Bing. 309. See also *Forgan v. Bourke*, 12 Ir. C. L. R. 495.

by custom, by either party giving the other a month's wages or a month's warning.

§ *As to the termination of contracts of service.*

In the absence of any express agreement, either party may terminate the contract by giving—

1. The *customary* notice, or
2. In the absence of any custom, *reasonable* notice.

§ A MASTER MAY DISMISS HIS SERVANT WITHOUT NOTICE—

1. For wilful disobedience to a lawful order.

Illustration. Renno agreed with Bennet to serve as carpenter's mate, on a voyage to the Southern Ocean. During the voyage he mutinously refused to work the ship, except to an English port. Bennet put him ashore at Java, and discharged him. In an action by Renno for wrongful dismissal, it was held, that Bennet was justified in discharging him without notice. (b)

2. For gross moral misconduct.

Illustration. Atkin, a clerk and traveller to Acton, hired by the year, assaulted Acton's maidservant, with intent to ravish her. In an action by Atkin for dismissal without notice, the Court held, that Acton was justified in what he had done. (c)

3. Habitual negligence. (d)

4. Conduct calculated seriously to injure his master's business.

Illustration. Read, a journeyman carpenter, was employed by Dunsmore, a master builder, on a job in a house of a gentleman named Trenchard. Dunsmore dismissed Read for poaching on Mr. Trenchard's premises. In an action by Read, it was held, that the master was justified in so doing. (e)

(b) *Renno v. Bennet*, 3 Q. B. 768.

(c) *Atkin v. Acton*, 4 C. & P. 208.

(d) *Robinson v. Hindman*, 3 Esp. 235 ; *Cullo v. Brounker*, 4 C. & P. 518.

(e) *Read v. Dunsmore*, 9 C. & P. 588.

5. Incompetence. (*a*)

6. Permanent illness. (*b*)

§ A CONTRACT OF APPRENTICESHIP, (*apprendre*, to learn) is where the master, being skilled in some handicraft, engages to teach the servant, as well as to employ and remunerate him.

[As the apprentice is usually an infant, and, therefore, incapable of contracting, his parent, or some other interested person, usually enters into covenants with the master, that the apprentice will complete his service.]

§ *It may be dissolved—*

1. By cancellation of the indentures with the consent of all parties.
2. By the death of either party.
3. By the bankruptcy of the master ; in which case a portion of the premium may be returned. (*c*)
4. By an apprentice, through the act of God being incapacitated from continuing the service.

Illustration. Firth became apprenticed to Boast, a chemist and druggist, and afterwards afflicted with a permanent illness. In an action by Boast for loss of services, it was held, that the non-performance of the contract by Firth was excused, as the parties must all along have had in contemplation the possibility of the defendant being permanently disabled by sickness. (*d*)

5. By order of a court of summary jurisdiction, which has power to order the whole, or part of the premium paid to be refunded. (*e*)

§ *It is not dissolved—*

1. By the apprentice falling sick.

(*a*) *Harmer v. Cornelius*, 28 L. J. C. P. 85.

(*b*) *Cuckson v. Stones*, 28 L. J. Q. B. 25.

(*c*) 32 & 33 Vict. c. 71, s. 33.

(*d*) *Boast v. Firth*, L. R. 4 C. P. 1,

(*e*) 38 & 39 Vict. c. 90, ss. 5, 6, 7, 12, 13.

2. By either party's misconduct.

[Though, if the apprentice refuses to learn, the master is absolved from his covenant to teach. (f)]

§ POWERS OF A COURT OF SUMMARY JURISDICTION *in the case of apprentices.*

1. A court of summary jurisdiction [that is, a stipendary magistrate, justice of the peace, or mayor of a borough] has power to hear and determine disputes between masters and apprentices, where the premium paid is under £25.

They may order—

- (i) The apprentice, under pain of fourteen days imprisonment, to perform his duties; or
- (ii) The instrument of apprenticeship to be cancelled and the whole or part of the premium to be repaid. (g)

2. *As to servants generally (other than domestic servants).*

The judge of a county court, or a court of summary jurisdiction, where the amount in dispute does not exceed £10, has power—

- (i) To hear and determine all kinds of claims and counter claims,
- (ii) To rescind, or order security to be given for the due performance of, contracts between employers and workmen. (g)

II. CONTRACTS OF TASKWORK. (See *post*, Bailments, *locatio operis facienda*, *post*, Book II. Chap. V.)

§ In contracts of this character—

1. The employer furnishes the materials.
2. The employed contributes his labour.

For example. Where Jones sends to Smith (a tailor) cloth to be made up into a coat.

[NOTE. Where the employed provides the materials, as well as the labour, the contract is one of *sale*.

(f) *Raymond v. Minton*, 1 Ex. 244.

(g) 38 & 39 Vict. c. 90, ss. 5, 6, 12.

Illustration. Where Lee, a dentist, agreed to make Griffin a set of artificial teeth, the court held the contract to be one of sale, and not one of work and labour. (a)]

§ *The employer impliedly contracts.*

1. To supply the materials.
2. To do nothing to mislead the employed, as to the work undertaken.
3. To accept the work when complete.
4. To pay the customary or reasonable hire.

§ *The employed impliedly contracts.*

1. To commence the work without delay.
2. To exercise reasonable care, skill, and diligence in the performance.
3. To follow the directions of the employer.
4. To complete the work in a proper and workmanlike manner.

§ *Unskilful work.* If the employed does his work so unskilfully, as to render it useless to the employer, he cannot demand payment for it.

Illustration. Duncan agreed with Blundell to erect a stove in Blundell's shop, and to lay a tube under the floor, for the purpose of carrying off the smoke. Duncan did the work, but the plan was a failure, and the stove could not be used. In an action by Duncan, for work and labour, it was held that, as the employer derived no benefit from what was done, the plaintiff was not entitled to recover. (b)

§ *The employed has a lien on the material for the work which he has bestowed on it. But no right of sale.*

§ WHERE A SPECIAL CONTRACT REMAINS UNCOMPLETED, NO ACTION WILL LIE IN RESPECT OF WORK AND LABOUR EXPENDED IN ITS PART PERFORMANCE (or what is called on a "*quantum meruit*.")

(a) *Lee v. Griffin*, 30 L. J. Q. B. 252.

(b) *Duncan v. Blundell*, 3 Starkie, 6.

Illustrations. (a.) One Cutter, a sailor, was engaged by Powell, the master of the "Governor Parry," on a voyage from Jamaica to Liverpool, for a lump sum of thirty guineas, provided he "proceeded, continued, and did his duty, as second mate, till the end of the voyage." Cutter died on the voyage, and his personal representative sued Powell for the amount of wages earned up to the day of Cutter's death. It was held that he could neither recover on the special contract, as that had never been performed; nor on a *quantum meruit*, for the parties having entered into an express contract, the law would not imply any other. (c)

(β.) Appleby & Co. agreed to erect certain machinery on Myers' premises, at specific prices for particular portions, and to keep it in repair for two years, the price to be paid on completion of the whole. After some portion of the work was finished, the premises, machinery, and materials were destroyed by an accidental fire. In an action by Appleby & Co. for the price of what they had completed, it was held that, as the special contract remained unperformed, they were not entitled to recover anything in respect of the portion of the work which had been executed. (d)

§ EXCEPTIONS.

1. *Where the work is in its nature divisible and apportionable, and there is nothing in the contract itself to the contrary, the right of remuneration accrues to the employed, as the work proceeds.*

Illustration. Roberts, a shipwright, engaged to put a ship of Havelock's into thorough repair. Before the job was finished, Roberts demanded payment for what was complete, and was refused. In an action by Roberts for the price of the labour and

(c) *Cutter v. Powell*, 6 T. R. 320.

(d) *Appleby v. Myers*, L. R. 2 C. P. 651.

materials already expended by him, it was held that he was entitled to recover, notwithstanding that his contract was unperformed. (a)

2. *Where work has been done under the special contract, but not in accordance with it, and the other party has derived any benefit therefrom, a new promise is implied on the part of the latter to remunerate in proportion to the benefit he has received.*

Illustration. Darthez & Co. chartered a vessel of Mitchell, from London to Buenos Ayres, there to deliver her cargo, reload, and proceed to a port between Gibraltar and Antwerp; freight for voyage out and home £1,300, £200 to be paid in London on sailing, the remainder on final delivery of home-ward cargo. The ship proceeded to Buenos Ayres, delivered her cargo there, and sailed thence with a cargo of hides, consigned by Darthez & Co. for Gibraltar. At Fayal the ship and about one-third of the hides were lost. The vice-consul there, acting for Darthez & Co., transmitted the residue by another vessel to Darthez & Co.'s consignee at Gibraltar, where they were accepted. In an action by Mitchell for the whole freight, it was held that he could not recover the £1,300, as he had not performed his contract; but that Darthez & Co. had accepted the hides at Fayal, and conveyed them on their own account to Gibraltar, and were liable to pay freight for the portion of the voyage terminating at Fayal, on a new implied contract to remunerate Mitchell for the service, of which they had received the benefit. (b)

3. *Where one party has, either—*

(i) *Absolutely refused; or,*

(a) *Roberts v. Havelock*, 3 B. & Ad. 404.

(b) *Mitchell v. Darthez*, 2 Bing. N.C. 555.

- (ii) *Rendered himself unable to perform, a special contract ;*

THEN the other party may elect, either—

- (i) *To sue at once for the breach of such special contract ; or,*
 (ii) *To treat it as rescinded, and sue on a quantum meruit for what has been performed.*

Illustrations. (a.) Hochster, a courier, agreed with De la Tour to enter his service on the 1st of June then next, at the rate of £10 a month. On May 11th, De la Tour gave notice that he should not carry out the engagement; and on May 22nd Hochster brought an action for breach of contract. It was held, that he was entitled to do so. (c)

- (β.) Colburn & Co. engaged Planché to write an article on ancient armour for their publication the "Juvenile Library." Planché made a journey to inspect a collection of armour, and made drawings thereof, and wrote part of his work. Colburn & Co., however, in the meantime, found the "Juvenile Library" a failure, and put an end to its existence. Planché sued them on a "*quantum meruit*." It was held, that the defendants had incapacitated themselves from performing their contract, and that the plaintiff was right in treating it as abandoned, and in suing for the work he had done. (d)

(c) *Hochster v. De la Tour*, 2 E. & B. 678.

(d) *Planché v. Colburn*, 8 Bing. 14.

CHAPTER V.

BAILMENTS.

§ A BAILMENT is a delivering (*bailler* to deliver) of a chattel to another, for the purpose of its being dealt with in some way by that other, either gratuitously, or for reward.

For instance. If Jones sends his horse to Smith to be shod, that is a bailment of the horse to Smith for the purpose of the horse having his shoes nailed on.

§ BAILMENTS are of different kinds and may be classed as follows :

I. *Those for the benefit of the bailor.*

- (i) *Depositum.* This is where the bailor deposits a chattel with the bailee to be kept by him, gratuitously, for the bailor.

For example. Where Jones, while he is on the continent, leaves his plate at his bankers, who make him no charge.

- (ii) *Mandatum.* Where the bailor delivers a chattel to the bailee, who is to take some active step with regard to it, gratis.

For example. Where Jones hands his watch to Smith, for Smith to take it to a watchmaker for him, without charge.

II. *Those for the benefit of the bailee.*

- (i) *Commodatum.* This is where the bailor, gratuitously, lends a chattel to the bailee, to be used by him and returned.

For example. Where Jones lends Smith a dog, or a gun, or a toasting fork, and Smith is to return to him the identical dog, or gun, or toasting fork.

- (ii) *Mutuum.* Where the bailor, gratuitously, lends the

bailee a chattel for consumption by him, and one of like nature is to be returned to the bailor.

For example. Where Jones lends Smith a dozen of champagne, which Smith is to consume, and Smith is to return another dozen of a like description.

III. *Those for the benefit of both bailor and bailee.*

- (i) *Vadium.* Where the bailor gives the bailee an article in pawn.

[This is the bailment of a chattel, as a *collateral* security for the performance of an engagement, with an implied promise of restoration of the chattel, on the performance of the engagement.]

- (ii) *Locatio rei.* Where the bailor lets a chattel for hire.
 (iii) *Locatio operis faciendi.* Where the bailor delivers a chattel to the bailee.

1. To be kept,
2. To be carried,
3. To have work performed upon it,

by the bailee for a reward to be paid to him.

For example. Where Jones sends materials to Smith, and Smith is, for a price, to make them into a coat for Jones.

§ DUTIES AND LIABILITIES OF A BAILOR, AND A BAILEE IN THE CASE OF—

I. *Depositum and Mandatum.*

1. The chattel must not be used by the bailee for his own benefit, otherwise the contract becomes one of "*commodatum*."
2. The bailee has no lien on the chattel for any expenses he may have been put to in regard to it.
3. The bailee is bound to take such care of the chattel, as a reasonable man would take of his own; and is liable for *gross* negligence only. (See *post*, Book III. Part IV. Chap. II.)

4. The risk of loss, except from gross negligence, remains with the bailor.

II. 1. *Commodatum*.

- (i) The risk of loss, except from negligence, remains with the bailor.
- (ii) The bailee is bound to take the utmost care of the chattel, and is liable for *the least* negligence. (See *post*, Book III. Part IV. Chap. II.)

2. *Mutuum*.

The risk of loss passes to the bailee.

III. *Vadium*.

1. The chattel may be used by the pledgee, if it is of such a character, as not to become the worse for wear; but this will be at the pledgee's risk in case loss should result.
2. There is an implied warranty of title on the part of the pledgor. (*a*)
3. There is an implied promise on the part of the pledgee to return the pledge as soon as the object of the pledging has been accomplished. (*a*)
4. The pledgee is bound to take such care of the chattel as a reasonable man would take of his own; and is only liable for ordinary negligence. [See *post*, Book III. Part IV. Chap. II.]
5. If the time for redemption is fixed, it cannot be curtailed by either party.
6. The chattel may be sold by the pledgee on default made by the pledgor, where the time for redemption is fixed; and where it is not fixed, at any time after notice to the pledgor. (*b*)
7. On the sale of the chattel, the pledgee must account to the pledgor for the balance, if any, beyond the amount for which the pledge was collateral security.

(*a*) *Cheeseman v. Exall*, 6 Ex. 344.

(*b*) *Pigot v. Cubley*, 15 C. B. N. S. 701.

8. The risk of loss, except from negligence, remains with the pledgor.

[The law relating to pledges taken by pawnbrokers, where the amount advanced is £10 and under, is now governed by the Pawnbroker's Act, 1872. (c)]

IV. *Locatio rei.*

1. If the chattel is let for any particular purpose, the bailor warrants that it is reasonably fit for that purpose; but does not warrant against any latent defect undiscoverable by reasonable examination.

Illustration. Cockrell, and certain other gentlemen, were stewards of the Cheltenham steeple-chases. He contracted with a competent builder to erect a stand, to which the public were to be admitted to see the races at 5s. per head. The builder constructed the stand improperly, not to Cockrell's knowledge, but, still, so that a competent surveyor would have discovered the defect. When the race meeting was held, the stand gave way, and Francis, who was upon it as a spectator, was injured. In an action by Francis, it was held, that Cockrell was liable, as the contract between him and the public was, that the stand was reasonably fit for the purpose for which it was built and that due care had been exercised in its construction. (d)

2. The bailee of a chattel, let to him for hire, is bound to use it in a proper and reasonable manner.
3. And to restore it within a reasonable time, in the same condition in which he received it, reasonable wear and tear being allowed for.
4. The bailee is bound to take such care of the chattel

(c) 35 & 36 Vict. c. 93.

(d) *Francis v. Cockrell*, L. R. 5 Q. B. 501.

as a reasonable man would of his own, and is only liable for ordinary negligence. (See *post*, Book III. Part IV. Chap. II.)

Illustration. Keate hired a pair of coachhorses from Deane. On one of them being taken slightly ill, he prescribed for, and treated it, himself. The horse, in consequence died. In an action by Deane for the value of the horse, it was held, that Keate was liable, as he had not exercised that degree of care, which might be expected from a prudent man towards his own horse. (a)

5. The risk of loss (except from negligence) remains with the bailor.

V. *Locatio operis faciendi*—

1. The bailee is bound to take such care of the chattel as a reasonable man would take of his own; and is only liable for ordinary negligence. (See *post*, Book III. Part IV. Chap. II.)

Illustration. Searle left two carriages in charge of Laverick, a liverystable keeper, who put them into a recently erected shed. The shed, which had been built for him by a competent builder, was blown down, and the carriages injured. In an action by Searle for the damage done to the carriages, evidence that the shed had been unskillfully built was rejected, and the plaintiff was nonsuited. The Court held the nonsuit right, as the defendant was only bound to exercise such care in keeping the carriages as would be taken by an ordinarily careful man. (b)

2. The risk of loss (except in the case of negligence) remains with the bailor.

(a) *Deane v. Keate*, 3 Camp. 4.

(b) *Searle v. Laverick*, L. R. 9 Q. B. 122.

EXCEPT. In the case of—

1. Inn keepers ;
2. Common carriers ;

who are held to be “Insurers,” and to guarantee the safety of goods entrusted to them, in any event.

Unless the loss arises from—

- (i) The act of God ;
- (ii) The Queen’s enemies ;
- (iii) Contributory negligence on the part of the bailor. (See *post*, Book III. Part IV. Chap. I.)
- (iv) Inherent vice in the chattel itself.

Illustration. Smith was secretary to a line of steamers running between London and Aberdeen. Nugent shipped a mare on board one of such steamers. During the voyage the weather was rough, and partly from this cause and partly from the mare herself becoming frightened and struggling, and without any negligence on the part of the ship-owner’s servants, the mare was injured, and subsequently died. In an action by Nugent for the value of the mare, it was held, that a common carrier does not insure against the irresistible force of nature, or against defects in the thing itself carried. (c)

[INNKEEPERS.]

§ The liability of innkeepers is further limited by the “Innkeepers Act, 1863,” (d) which provides that—

§ *An innkeeper is only liable to the amount of £30 for the*

(c) *Nugent v. Smith*, 1 C. P. D. 423.

(d) 26 & 27 Vict. c. 41.

goods of a guest, which have been brought upon the premises.

Unless—

1. The goods shall have been “stolen, lost, or injured through the wilful act, default, or neglect, of the innkeeper or his servants.”
2. The goods have been deposited with him expressly for their safe custody.
3. He has failed to exhibit in the entrance hall of his inn a copy of the first section of the Innkeepers Act, 1863.

Illustration. Bacon kept the “Old Ship Inn” at Brighton, and posted in his hall a copy of the first section, from which the word “act” was accidentally omitted, and the sentence ran, “wilful default or neglect,” instead of “wilful *act*, default, or neglect.” Spice occupied a bedroom in the inn; and his watch, rings, and purse were stolen during the night. In an action by Spice for their full value, £119, it was held, that Bacon was not protected by the statute, since he had failed to exhibit a copy of a material portion of its first section as required. (*a*)

§ *An innkeeper has a lien* for his charges on all goods brought to the inn by the guest.

§ He may sell the same to discharge the debt of the guest after the expiry of six weeks, and after a month’s notice of the intended sale has been given in certain newspapers (*b*).

[COMMON CARRIERS.]

§ **COMMON CARRIERS.** Persons who undertake to transport passengers or goods from one fixed place to another, for hire, either by land or water.

(*a*) *Spice v. Bacon*, 2 Ex. D. 463; 26 & 27 Vict. c. 41, s. 1.

(*b*) The Innkeepers Act, 1878, 41 & 42 Vict. c. 38.

[NOTE. Carriers were held, at common law, to be responsible for the safety of the goods entrusted to them, (subject to the exceptions above referred to on p. 87) by reason of their having greater facilities than other bailees for combining with thieves to the prejudice of the public. This was a very onerous liability, and a practice grew up among the carriers, of insisting on the parties, for whom they were to carry goods, entering into a special agreement limiting the risk, or paying a proportionately increased freight. Notices were posted up by them in their receiving offices, which were held by the courts, if brought to the knowledge of the consignor, to be incorporated in the ordinary contract to carry; though the carriers were still liable for gross negligence. In consequence of the frequency of the disputes which arose upon the question of the consignor having a knowledge of the notice, the legislature passed the "Land Carriers Act, 1830," which limited the carriers' liability to the amount of £10 upon various descriptions of goods, unless their value was declared, and an increased charge paid on account of them. The right to make special contracts was not, however, interfered with. As time went on, the railways and canals gradually obtained a monopoly of the carrying trade, and by insisting on taking goods only on the terms of special contracts, were in a fair way to emancipate themselves from all risk of loss, even when it arose from their own gross negligence. The legislature accordingly stepped in again, and passed the "Railway and Canal Traffic Act, 1854," which prohibits the companies from avoiding their liability by means of notices and conditions, but allows them to make special contracts, which are just and reasonable in the opinion of the courts, provided they are in writing, and signed by the consignor. It also limits their liability on the carriage of various ani-

mals, unless their value is declared, and a higher freight paid.]

§ RIGHTS AND LIABILITIES OF COMMON CARRIERS.

1. A common carrier is bound to receive all such goods, as he professes to carry, on the proper charge being tendered.
2. He is bound to use reasonable despatch.
3. The carrier impliedly promises that he will provide conveyances reasonably fit for the purpose, to which they are put, and servants of competent skill.
4. He has a lien on the goods conveyed, for the freight of those goods ; but not for a general balance due to him.
5. In the absence of any special agreement, the carrier is liable for the due performance of his contract to the consignee, and not the consignor ; unless the right of property, and the risk remain with the consignor.

For instance. If Jones sells Smith a hogshhead of ale at 1s. 6d. a gallon, and delivers it to a carrier to convey to Smith, he is acting as Smith's agent in so delivering it ; and Smith, in the event of the ale being lost, will be the party to sue the carrier. But if Jones sends Smith by carrier fifty pairs of boots "on sale or return," and the boots are lost on the road, the property in them remains with Jones, and he is the party to sue the carrier.

6. A common carrier is not bound to carry live animals, and may decline to receive them, except under a special contract. (a)
7. He is not bound to convey dangerous goods ; and the transport of certain dangerous articles is regulated by the "Explosives Act, 1875." (b)
8. He cannot refuse to receive packages on the ground of a refusal to give information as to their contents. (c)
9. Railway companies are not common carriers of passengers ;

(a) *Harrison v. L. B. & S. Coast Ry. Co.*, 31 L. J. Q. B. 113.

(b) 38 Vict. c. 17.

(c) *Crouch v. L. & N. W. Ry. Co.*, 7 Ex. 705.

and do not warrant their safe conveyance at all events ; but are liable for the least negligence. (*d*)

10. A railway company in virtue of the private statute by which it is incorporated, is made a common carrier of the personal luggage of passengers ; and is liable for its safe delivery, *unless* the passenger takes it under his own immediate control.

Illustration. Bergheim travelling to Yarmouth by the Great Eastern Railway, directed a porter on the platform, where the train was drawn up, to put a valuable dressing-bag into the compartment in which he, Bergheim, was about to travel, while he went to the refreshment room. The porter did as he was ordered, and locked the door of the carriage. On Bergheim's returning and entering the carriage it was discovered that the bag had been stolen. In an action by Bergheim for the value of the bag, the jury found that there had been no negligence on either side ; and the court held that the company were not insurers of luggage placed, at the traveller's request, in the compartment in which he was himself to be carried. (*e*)

11. Common carriers, by land, are not liable to a greater extent than £10 on the loss of the following goods. (*f*)

Unless—

- (i) Their value has been declared, at the time the goods are received from the consignor.
- (ii) A proportionately increased charge is paid for freight. (*g*)

(*d*) *Redhead v. The Midland Ry. Co.*, L. R. 4 Q. B. 383.

(*e*) *Bergheim v. Gt. E. Ry. Co.*, 3 C. P. D. 221.

(*f*) Gold or silver coin : gold or silver, whether in a manufactured state, or no ; precious stones, jewelry, watches, clocks, time-pieces, trinkets, bills, bank-notes ; orders, notes, or securities for the payment of money ; stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured state, or not, furs, lace.

(*g*) The Carriers Act, 1830, 1 Will. 4, c. 68.

12. Every railway and canal company is liable for any damage caused by the neglect, or default, of their servants, in receiving, forwarding, and delivering, animals, and goods, notwithstanding any notice or condition to the contrary which they may have made.

They are not however liable for damage done to a horse, or neat cattle, or sheep and pig, to a greater extent than £50, £15, and £2 per head, respectively.

Unless—

- (i) Their higher value has been declared at the time the goods are received from the consignor.
- (ii) An additional charge is paid in respect of the greater value.

They may make a special contract with the consignor.

Provided—

- (i) It is just and reasonable.
- (ii) It is in writing.
- (iii) It is signed by the consignor. (a)

[**NOTE.** It has been held that the “reasonable condition,” and the “special contract in writing” mentioned in the 7th section of the Railway and Canal Traffic Act are synonymous. (b)]

13. Where goods have been stolen by the servants of the carrier, he is not protected by the “Carriers Act, 1830.” (c)

14. Carriers *by water*, can limit their liability (except where the loss arises from their own negligence) by a special contract, such as the clauses in a charter party or a bill of lading, which provide against loss by fire, dangers and accidents of the seas, rivers, navigation, &c.

15. The owner of a seagoing ship is not liable for damage, happening without his fault.

(a) The Railway and Canal Traffic Act, 1854. 17 & 18 Vict. c. 31.

(b) 17 & 18 Vict. c. 31, s. 7 ; *Peek v. N. Staffordshire Ry. Co.*, 8 H. L. C. 473.

(c) 1 Will. 4, c. 68, s. 8.

(i) For goods damaged by fire on board his ship.

(ii) For any gold, silver, watches, jewels, or precious stones, stolen, or embezzled, on board his ship.

Unless the shipper has, at the time of loading, declared their value in writing. (d)

16. A shipowner is not liable for damage happening without his fault, to (i) person or (ii) property on board his ship to a greater extent than £15 and £8, respectively, for every ton of the ship's registered tonnage. (e)

17. Carriers by *land and sea* jointly, by publishing in their booking-office, and printing on the back of their receipt, or freight-note, a notice to the effect that they will not be responsible for damage caused by fire or accident to animals and goods carried by sea, may limit their liability in that respect. (f)

18. Railway companies are bound to make the same charge for carriage to all parties without favour. (g)

19. A railway company, which forwards goods by other lines beyond its own limits, and receives an entire payment for the whole journey, is liable to the consignee, though the goods are lost when in the custody of the other company.

Illustration. Goods were delivered at Bath to the Great Western Railway Company, who received the freight for the whole journey, to be carried to Collins at Torquay. The line of the Great Western Railway ended at Bristol, where the goods had to be transferred to the Bristol and Exeter Railway Company; while under the care of the Bristol and Exeter Railway Company the goods were destroyed by fire. In an action against the Bristol and Exeter Railway Company by

(d) Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 503.

(e) Merchant Shipping Amendment Act, 1862, 25 & 26 Vict. c. 63, s. 54.

(f) Regulation of Railways Act, 31 & 32 Vict. c. 119, s. 14.

(g) 8 & 9 Vict. c. 20, s. 90.

Collins for the value, it was held that the contract had been made with the Great Western Railway Company, and that the Bristol and Exeter Railway Company were not liable. (a)

20. At the end of the transit the carrier is bound to keep the goods a reasonable time for the consignee to claim them in, during which time his liability as an insurer continues. After a reasonable time this extraordinary liability ceases, and he becomes a mere bailee of the goods for hire.

Illustration. Heugh & Co., acting on an order supposed to come from the Southwark India-rubber Company, but really sent fraudulently by one Nurse, a former traveller of the company, consigned certain goods by the London and North Western Railway Company to the India-rubber Company. The railway company having tendered the goods at the premises of the India-rubber Company, where they were refused, took back the goods to the station, and sent an advice-note to the India-rubber Company asking for instructions. Nurse called two days after with the advice-note, and a forged delivery order, and the railway company delivered the goods to him. In an action by Heugh & Co., against the railway company, it was held that the railway company at the time of the delivery to Nurse, had ceased to be carriers, and had become involuntary bailees of the goods, and were only bound to act with ordinary care, and that Heugh & Co. could not recover. (b)

(a) *Collins v. The B. & E. Ry. Co.*, 7 H. L. C. 194.

(b) *Heugh v. L. & N. W. Ry. Co.*, L. R. 5 Ex. 51.

CHAPTER VI.

OF CONTRACTS OF INDEMNITY.

I. GUARANTIES.

§ A **GUARANTIE** is a promise to answer for the debt, default, or miscarriage of another, who is himself primarily liable.

For example. Where Jones promises that if Smith will give Robinson credit he will pay Smith's account against Robinson, if Robinson fails to do so.

§ *Its essentials—*

1. It must be in *writing* and *signed* by the party to be bound, or there must be a sufficient memorandum of it to satisfy the Statute of Frauds. (c) [See *ante*, pp. 41, 46, 47.] But the consideration need not appear on the face of the guarantie. (d) [See *ante*, p. 46.]
2. The third party (the principal) must be *primarily* liable.

Illustration. Gammon, in consideration that Bird and certain other creditors of one Lloyd, should give up their claims against Lloyd, and that Lloyd's farm should be assigned to Gammon, promised to Bird the amount due to him. Bird sued Gammon for the amount, alleging a guarantie on Gammon's part to pay Lloyd's debt. But the court held that he could not recover, as Lloyd having ceased to be liable, Gammon's promise was not one to pay the debt of a third party. (e)

(c) 29 Carl. 2, c. 3, s. 4.

(d) 19 & 20 Vict. c. 97, s. 3.

(e) *Bird v. Gammon*, 3 Bing. N. C. 883.

3. The debt, or act, for which the guarantie is given, must be a *future* and not a past transaction.

Illustration. Welch and Adams gave the London and Provincial Bank a letter, in which they promised to indemnify the bank to the extent of £1,000 advanced, or to be advanced, to one Pinney. At that time Pinney was indebted to the bank to the amount of upwards of £1,400. In an action by the bank on this letter, it was held that the sum already advanced amounted to more than the sum which the letter guaranteed; and the indemnification, therefore, being for a past consideration, no action would lie. (a)

4. An offer of a guarantie must be accepted, before it becomes binding on the guarantor.

Illustration. Tinkler directed the following letter to Mozley & Son, publishers :—" Gentlemen, Mr. France informs me you are about publishing an arithmetic for him and another person, and I have no objection to being answerable as far as £50." This letter was sent to Mr. Mozley, who, without communicating with Tinkler, proceeded with the publishing. In an action by Mozley & Son against Tinkler on the letter, the court held that it was only a proposal; which required an answer; and as the plaintiffs had not communicated their acceptance to the defendant no action could be sustained. (b)

§ RIGHTS AND LIABILITIES OF THE SURETY.

1. *The surety is discharged, if without his consent.*

- (i) The original contract is materially altered, or a new contract is substituted for it.

Illustration. Harrison agreed with Smurthwaite to

(a) *Bell v. Welch*, 9 C. B. 154.

(b) *Mozley v. Tinkler*, 1 C. M. & R. 692.

purchase of him an unfinished ship called the "Devonport," for the price of £14,750, and an old ship of Harrison's to be taken in exchange called the "Lord Dalhousie"; and also, that Smurthwaite should finish the "Devonport" within two weeks of her arriving in London, and repair the "Lord Dalhousie," and procure her to be classed A 1 at Lloyds for eight years, Harrison advancing the sum of £6,000 to Smurthwaite on mortgage of the "Lord Dalhousie." Seymour gave Harrison his bond as surety to Smurthwaite, conditioned to be void, if Smurthwaite repaired the "Lord Dalhousie" forthwith, and finished the "Devonport" within the two weeks in the fashion agreed upon. Afterwards Harrison and Smurthwaite made another agreement, without the knowledge of Seymour, whereby the time for the completion of the "Devonport" was shortened, and additional work was to be done to her. In an action by Harrison against Seymour on the bond, Smurthwaite having made default, it was held, that, as far as concerned the "Lord Dalhousie," the defendant was liable; but as the contract in respect of the "Devonport" had been materially altered behind his back, he was absolved as to that part of his liability. (c)

- (ii) The creditor by a *binding* contract enlarges the time for payment by the principal.

Illustrations. (a.) The Croydon Gas Company contracted with Dickinson to supply him with ammoniacal liquor, payment to be made monthly, and within the first fourteen days of each month. Pollard & Child were sureties for Dickinson that

(c) *Harrison v. Seymour*. L. R. 1 C. P. 518.

he would pay what from time to time became due to the gas company. After the first fourteen days of August, 1875, the company took a promissory note from Dickinson for the amount due for July. Dickinson made default in payment of the amounts due for July, August, and September. In an action by the company against the sureties, it was held that, as they had given Dickinson further credit by taking his promissory note for the amount due in July, the sureties were absolved as to that payment, though not as to those due in August and September. (a)

(β.) Coombe & Delafield were brewers, and supplied one Joseph with porter, on a guarantie from Woolf. On December 1, 1829, there was £45 due from Joseph. Coombe & Delafield applied for payment in June and August, 1830, and, failing to get paid, they, in October, took Joseph's promissory note for the amount, at two months. In November, Joseph became bankrupt, and Coombe and Delafield sued Woolf on the guarantie. It was held that as they had disabled themselves from suing Joseph immediately, by taking his note at two months, time had been given him by a binding contract, and the surety was discharged. (b)

2. *The surety may, when his promise is not made under seal, at any time after notice to that effect, revoke his promise, and discharge his own liability in futuro.*

Illustration. Davies & Son guaranteed the payment by Davies & Co., of Newtown, of all bills Offord should discount for Davies & Co., of Newtown, for the space of twelve months. Before the end of the twelve

(a) *Croydon Gas Company v. Dickinson*, 2 C. P. D. 46.

(b) *Coombe v. Woolf*, 8 Bing. 156.

months, Davies & Co. revoked their guarantie by notice. In an action by Offord on the guarantie for non-payment by Davies & Co., of Newtown, of bills discounted by him after the date of the notice, it was held that the revocation was good, and that he was not entitled to recover. (c)

3. *As soon as the principal has made default, the surety may step in, pay the debt, and sue the principal in the creditors name.*

Illustration. WILLIAMS, J., says, in *Strong v. Foster*, "What I understand by a giving of time is this. The surety has a right at any moment to go to the creditor and say, 'I have reason to suspect the principal debtor to be insolvent, therefore *I shall call upon you to sue him, or permit me to sue him.*' If the creditor has voluntarily placed himself in such a position as to be compelled to say he cannot sue him, he thereby discharges the surety." (d)

4. *It is the surety's duty to see that the principal fulfils his engagements; and there is no obligation of active diligence against the principal on the creditor's part.*

Illustration. Goring, in April, 1825, sold certain timber to Edmonds, junior, on a guarantie being given by Edmonds, senior, that the son would pay. Goring received part payment from the son, and made repeated unsuccessful applications to him for the residue till December, 1827, when the son became bankrupt. Goring never disclosed the result of these applications to the father, but sued him on the guarantie. It was held that Edmonds, senior, was not discharged by the time that had elapsed, nor by want of notice of the failure to obtain payment from the son. (e)

(c) *Offord v. Davies*, 31 L. J. C. P. 319. *Coulthart v. Clementson*, 5 Q. B. D. 42.

(d) *Strong v. Foster*, 17 C. B. 219.

(e) *Goring v. Edmonds*, 6 Bing. 94.

5. *If the principal has made default, the creditor may, by a binding contract give him time and reserve all remedies against the surety.*

Illustration. William Brown, as principal, and George Hopps, as surety, entered into a bond with the "York City and County Banking Company," to secure Brown's banking account. Subsequently the bank covenanted by a deed poll not to sue Brown, reserving their rights against Hopps. In an action by the bank against the executors of Hopps, it was held, that the effect of this deed was to allow the surety to retain all his rights against the principal debtor; and that the covenant not to sue only operated so far as the rights of the surety were not affected, and as his position therefore was unaltered, he was not discharged. (a)

6. *The surety may sue the principal for money paid on his guarantie. There being an implied promise, on the principal's part, to repay the surety anything he has been compelled to pay thereunder. (b)*
7. *A co-surety can, if he pays more than his share, recover the amount over-paid, from the other co-sureties. (c)*
8. *The surety, who has paid on a guarantie, is entitled to have assigned to him any securities the creditor may hold of the principals; and to stand in every way in the creditor's shoes, with reference to the principal. (d)*

II. CONTRACTS OF INSURANCE.

§ A CONTRACT OF INSURANCE is where one agrees to indemnify another in respect of the loss, to which property of the latter may be exposed, in consideration of a sum of money paid, as the price of the risk run.

(a) *Price v. Barker*, 4 E. & B. 769.

(b) *Warrington v. Furber*, 8 East, 242.

(c) *Kemp v. Finden*, 12 M. & W. 421.

(d) 19 & 20 Vict. c. 97, s. 5.

The insured or assured is the party indemnified.

The insurer, assurer, or underwriter [because he subscribes his name at the foot of the contract] is the party who gives the indemnity.

The policy of insurance is the contract of indemnity itself.

The premium is the sum paid as the consideration.

I. A **MARINE POLICY** is taken by the owners of ships for the insurance of a ship, or freight to be carried; and by owners of cargoes, for the insurance of goods, or of expected profits on the sale of goods; against the perils of the sea, men of war, fire, enemies, pirates, letters of mart and countermart, takings at sea, arrests, restraints of princes and peoples, barratry [*barratare* to cheat; any fraud by which the shipowner is injured] of the master, or the mariners.

[*Negligence* of the captain, or the crew, is a peril of the sea.]

1. A *voyage policy* is where the risk is guaranteed for the voyage of the ship from port to port.

2. A *time policy* is where the risk is guaranteed for a particular period of time.

(i) A *valued policy* is where the amount of the loss guaranteed is specified in the contract.

(ii) An *open policy* is where the loss guaranteed is not expressed in the policy, but is left to be calculated on the happening of the loss.

§ A VALID POLICY MUST—

1. Specify—

(i) The particular risk. (*e*)

(ii) The names of the underwriters. (*e*)

(iii) The sum insured. (*e*)

(iv) The name of, or the name of the firm of,

(a.) One of the parties interested in the policy, or

- (β.) The consignor, or the consignee of the goods insured, or
 - (γ.) The broker negotiating the insurance, or
 - (δ.) The parties directing the broker to negotiate the insurance. (a)
2. Not be made for any period exceeding twelve months. (b)
 3. Be duly stamped. (c)
 4. Be entered into, only, by one, who has an interest in the subject matter of the insurance, [otherwise it is void, as a contract by way of gaming, or wagering.] (d)
- [NOTE 1. *A person has an interest*, who may be injured by the risks, to which the subject matter of the policy is exposed. (e)]
- [NOTE 2. *The underwriter may himself reinsure* the ship, or goods, which he has guaranteed. (f)]
5. The vessel must be in existence at the time the insurance is effected; *unless* the policy is expressly stated to be made. "lost or not lost."

§ A POLICY MAY BE ASSIGNED, by endorsement; and the assignees may sue thereon in their own names. (g)

§ THERE IS AN IMPLIED WARRANTY BY THE INSURED, in a
1. policy of insurance on a ship.

That the ship is, at the commencement of the voyage, "seaworthy," and properly equipped and manned.

- (i) In the case of a voyage policy, but
- (ii) In the case of a time policy, there is *no such warranty*. [For it is usually effected when the ship is at sea, and the owner has no knowledge of its condition.] (h)

(a) 28 Geo. 3, c. 56, s. 1.

(b) 30 Vict. c. 23, s. 8.

(c) *Ibid*, s. 9.

(d) 19 Geo. 2, c. 37, s. 1.

(e) *Lucena v. Crauford*, 2 N. R. 301.

(f) 27 & 28 Vict. c. 56, s. 1.

(g) 31 & 32 Vict. c. 86, ss. 1 and 2.

(h) *Smule v. Gibson*, 4 H. L. Ca. 353.

2. That he will do nothing himself to enhance the risk. (i)
3. That the vessel will proceed without delay, and without deviation, to her destination. (k)

§ THE UNDERWRITER WILL BE LIABLE—

1. *For an actual total loss—*

- (i) Of cargo; when it is annihilated, or has been permanently taken from the control and benefit of the insured.
- (ii) Of freight; when it cannot be earned, through loss of the voyage by the peril insured against.
- (iii) Of the ship; when it is annihilated, or permanently removed from the insurer's control and benefit (as in the case of capture by the enemy).

2. *For a constructive total loss.* When the ship, or cargo, have been so damaged by the perils insured against, that it would cost more to repair the ship, or to carry the goods to their destination, than the ship or goods are respectively worth.

Notice of abandonment must be given to the underwriters, within a reasonable time; if a claim is made for a constructive total loss.

For they are entitled to do what they can with the ship or cargo, so abandoned, for their own benefit.

3. *For a partial loss*, when damage is done to a portion of the ship, or cargo, by the perils insured against.

[NOTE. Partial loss, or a partial loss of under a certain amount per cent., unless it is general average loss, or the ship is stranded, is frequently excepted from the policy.]

4. *For general average*, the amount of contribution made

- (i) To recoup the owner of goods—

(a) Which have been jettisoned, or thrown overboard for the safety of the ship and cargo, during the perils insured against,

(i) *Oswell v. Vigne*, 15 East, 70.

(k) *Hammond v. Reid*, 4 B. & Ald. 72

(β) Which have been sold by the master to defray the expense of refitting the ship, when damaged by the perils insured against; by the respective owners of the cargo, and the ship and freight, which have been preserved through the sacrifice of what has been jettisoned.

(ii) Towards the expenses of salvage.

(iii) Towards the ship's expenses when forced to put into port, in consequence of the perils insured against.

5. *For particular average*, partial loss of goods, through the perils insured against, sustained by individual owners.

[NOTE. This is frequently excepted from the policy.]

II. A FIRE POLICY is an undertaking in consideration of a premium, to indemnify the insured against damage to his property by fire during a limited period.

[NOTE. A number of stringent conditions are usually attached to the policy, relating to the subject matter insured, to any alterations which may be made therein, to the nature of the risk, to the conditions of the claim in case of damage, its adjustment, &c., &c., all of which will be strictly construed.]

§ THE INSURED MUST HAVE AN INTEREST in the property guaranteed in the policy, otherwise the policy will be void. (a)

§ A FIRE POLICY IS NOT ASSIGNABLE, being a chose in action, *at common law*, so as to enable an assignee to sue in his own name thereon. (b)

[NOTE. But by virtue of the Judicature Act, 1873 (c), it would be assignable, *provided*—

(i) The assignment is in writing, and

(ii) Express notice in writing is given to the insurers.]

§ THERE IS AN IMPLIED PROMISE BY THE INSURED not to

(a) 14 Geo. 3, c. 48.

(b) *Lynch v. Daltzell*, 4 Bro. P. Ca. 431.

(c) 36 & 37 Vict. c. 66, s. 25, subs. 6.

alter the structure of the premises insured, so as to increase the risk, when the insurance has been effected upon a particular description of the building. (d)

§ **THE INSURED CAN ONLY RECOVER HIS ACTUAL LOSS**; and if he is insured in more than one office, he cannot if he is fully, or partly indemnified by one, further resort to another for more than the residue of his actual loss.

He may resort to whichever he pleases; and the others will be liable, as contributories, to the office, which pays the indemnity. (e)

§ **THE INSURERS CAN THEMSELVES LAY OUT THE INSURANCE MONEY IN REPAIRS**, on the request of persons interested in, or entitled to a building destroyed by fire; or upon any grounds of suspicion that the building has been fraudulently set on fire.

Unless, 1. The insured, within 60 days of the adjustment of the claim, gives security that the money shall be so expended; or

2. The money is at that time disposed of to the satisfaction of all parties. (f)

III. **A LIFE POLICY** is *not a contract of indemnity*, but an absolute promise to pay a certain sum in the case of death. (g)

[The insurer, in consideration of a premium, undertakes to pay the person, for whose benefit the insurance is made, a certain sum, or annuity, on the death of the person, whose life is insured.]

§ The person, for whose benefit the insurance is effected, must have *an interest* in the life insured. (h)

§ The names of the persons, so interested, must be inserted in the policy. (i)

(d) *Sillem v. Thornton*, 3 E. & B. 882.

(e) *Park on Ins.* 8th Ed. p. 600.

(f) 14 Geo. 3, c. 78, s. 83.

(g) *Dalby v. Indian and London Insurance Company*, 15 C. B. 365.

(h) 14 Geo. 3, c. 48, s. 1.

(i) *Ibid.* s. 2.

[NOTE. A trustee, or a creditor, has an insurable interest in the life of the *cestui que trust*, or the debtor.]

§ THE POLICY MAY BE ASSIGNED, either by indorsement, or by a separate instrument; and the assignee may sue in his own name on the policy. (a)

A written notice of the assignment must be given to the insurance company. (a)

§ IT IS THE DUTY OF THE INSURED to disclose all material facts within his knowledge at the time of effecting the insurance.

[The insurers, usually before the insurance is effected, require a declaration by the insured, and by a third party, to whom he makes reference, as to a variety of facts, concerning the habits and health of the insured, and the policy is conditioned to be void if a false declaration is made.]

§ THE POLICY WILL BE VOID APART FROM ANY CONDITION THEREIN, IF THE INSURED—

1. Is killed in a duel. (b)
2. Feloniously destroys himself. (b)
3. Suffers death as a felon. (c)
4. Makes any fraudulent representation, or concealment, of anything material to be known, at the time of effecting the policy.

(a) 30 & 31 Vict. c. 144, ss. 1, 5.

(b) *Wainwright v. Bland*, 5 M. & G. 639.

(c) *Amicable Society v. Bolland*, 4 Bligh. 194.

CHAPTER VII.

CONTRACTS MADE WITH AND BY AGENTS.

§ **AN AGENT** is one who, under authority from another, acts for that other within the scope of that authority.

A person unable personally to contract (as a married woman) can, as agent for another, enter into a contract binding on that other.

§ **A DEL CREDERE AGENT** (*credere*, to trust) is where, in consideration of a larger commission, an agent warrants to his principal the solvency of the parties with whom he deals. His contract, however, though substantially a guarantie, need not be in writing under the Statute of Frauds. (*d*)

§ **AN AGENT, WHO IS TO EXECUTE A DEED, MUST BE APPOINTED BY DEED.** (*e*)

§ **AN AGENT MUST BE APPOINTED BY A WRITING—**

1. To grant leases of more than three years duration.
2. To assign an interest in land.
3. To grant an interest in land.
4. To surrender an interest in land. (*f*)

§ **OF THE RIGHTS AND LIABILITIES OF PRINCIPAL AND AGENT INTER SE.**

1. *The Principal—*

1. May revoke his authority at any time, if there is no period defined for the continuing of the agency.

Illustration. Fletcher employed Marshall & Co. to purchase scrip in the Essex and Suffolk Railway Co.,

(*d*) *Couturier v. Hastie*, 8 Ex. 40.

(*e*) *Hunter v. Parker*, 7 M. & W. 343.

(*f*) 29 Carl. 2, c. 3, ss. 1, 2, 3.

and lodged the price in their hands. They did not succeed in obtaining the scrip before the then next settling day; and Fletcher sued them for the money he had paid over to them. Marshall & Co. raised as a defence that a reasonable time had not elapsed for them to find a vendor for the scrip; but the court held that this was no answer, as Fletcher was entitled, at any time, to countermand the authority to buy. (a)

2. An authority, coupled with an interest, cannot be revoked.

Illustration. John Leveson owed Foster & Co. £201, and, in order to pay them, authorized them to sell for him, and receive the purchase money of, certain copyhold premises in Hertfordshire; and gave them a power of attorney to appear at the then next Court Baron, and surrender the farm to the use of the purchaser. Foster & Co. sold the farm, and received the deposit. J. L. in the meantime duly revoked the authority, and gave notice thereof to the steward of the manor. The steward, on an indemnity being given, admitted the purchaser. Gaussen, who claimed through the purchaser, took possession, and J. L.'s representatives, Morton and wife, entered, and removed some hay. In an action of trespass by Gaussen against the Mortons, it was held, that, as the authority to Foster & Co. was coupled with an interest, it could not be revoked by J. L., and the sale was valid, and the plaintiff entitled to recover. (b)

3. If an agent employs a sub-agent, the principal has a remedy against the agent only.

(a) *Fletcher v. Marshall*, 15 M. & W. 763.

(b) *Gaussen v. Morton*, 10 B. & C. 731.

Illustration. Badcock, clerk to one John, an attorney, received certain monies on his master's behalf, which were due to a client of John's, named Stephens. John absconded, and Badcock refused to pay the money, so received, to Stephens. In an action by Stephens against Badcock for the sum so received by him, it was held, that the defendant was only bound to account to John, and that there was no privity between him and the plaintiff. (c)

4. The principal must indemnify the agent for all necessary payments made by him, and all losses not incurred by his own negligence, in the course of his employment.

Illustration. Stray employed Taylor and Aston, stock-brokers, to purchase for him 20 shares in the Royal British Bank. The brokers bought the shares, but before the settling day, the bank stopped payment, and Stray refused to accept and pay for the shares. Taylor and Aston, having been compelled by the rules of the Stock Exchange to pay for the shares, sued Stray for the price; and it was held, that he was bound to indemnify his brokers against the consequences of all acts, done by them in pursuance of the authority conferred on them by him. (d)

II. *The agent*

1. Impliedly promises to use due skill, care, and diligence.
2. Must obey the orders of his principal.
3. May exercise his discretion. (e)
4. May not himself purchase from his principals property, which he is entrusted by them to sell; or sell

(c) *Stephens v. Badcock*, 3 B. & Ad. 354.

(d) *Taylor v. Stray*, 2 C. B. N. S. 175.

(e) *Crosskey v. Mills*, C. M. & R. 298.

to them his own property, unless he deals with them strictly at arm's length. (a)

5. A right to his commission accrues as soon as the agent has concluded a contract on behalf of his principal with a third party.
6. Factors, brokers, and solicitors, have a right of lien on the property of their principals, which is in their hands, for their general balance.
7. If the agent exceeds his authority, he does so at his peril.

Illustration. Fitzgerald authorised Barron and Stewart to effect an insurance on his life, either in *his* own or in *their* own names, to secure a debt due from him to them. Barron and Stewart effected the policy in the names of themselves and *Smith their partner*. They from time to time paid the premia; and eventually sued Fitzgerald for the amount so paid by them. It was held that they were not entitled to recover, as the insurance was not made according to the authority given. (b)

8. An agent cannot dispute his principal's title to the property he is entrusted to deal with, *unless* it has been obtained by fraud on the part of the principal.

Illustration. Hardman employed Willcock, an auctioneer, to sell certain goods for him. Before sale, Willcock received notice from other parties, that the goods had been fraudulently obtained by Hardman. Willcock sold the goods, and rendered an account to Hardman, but refused to pay over the proceeds of the sale to him. Hardman sued him for the amount of such proceeds; and it was held, that though an agent is not entitled to set up the

(a) *Murphy v. O'Shea*, 2 J. & L. 422; *Waddell v. Blockey*, 4 Q. B. D. 678.

(b) *Barron v. Fitzgerald*, 6 Bing. N. C. 201.

jus tertii in an action brought against them by his principal, still, as Willcock had notice that the goods had been obtained by fraud, he was right, in this case, to retain the money as against Hardman. (c)

§ OF THE RIGHTS AND LIABILITIES OF PRINCIPALS ON CONTRACTS MADE BY AGENTS.

I. AS TO CONTRACTS UNDER SEAL—

1. The agent must be appointed by deed.
2. The covenants must be entered into by and with the principal; and the deed executed as and for the principal by his agent, lawfully appointed. Otherwise the principal can neither sue nor be sued on the deed.

Illustration. James Simmonds, for and on behalf of W. F. Berkeley, but not appointed his agent under seal, let a farm by indenture of lease to Hardy. Simmonds executed the lease in his own name simply; and the covenants were made by and with Berkeley. In an action by Berkeley on the deed, it was held that as the covenants were made with one party, and the lease was executed by another, he could not maintain his action. (d)

3. If the contract is made, and the covenants are entered into in the agent's own name simply, he is liable to be sued thereon himself, and must sue, if an action is to be brought, as trustee for the principal.
4. An agent, duly appointed under a power of attorney, may execute a deed on his principal's behalf.
 - (i) By signing his principal's name simply.
 - (ii) By signing his own name, and expressing it to be for his principal.

(c) *Hardman v. Willcock*, 9 Bing. 382.

(d) *Berkeley v. Hardy*, 5 B. & C. 355,

- (iii) By signing his principal's name, and expressing it to done through him, the agent. (*per pro.*)

II. AS TO CONTRACTS NOT UNDER SEAL.

1. *Rights of the principal.*

- (i) If the agent has contracted in his own name on behalf of an undisclosed principal, the latter may come forward and claim the benefit of the contract.

Provided—

1. The contract is executory.
2. The agent has not expressly described himself in a *written* contract as being the principal. (*a*)
[See below.]
3. The inducement to the third party to enter into the contract was not based on the special character or credit of the agent.

Illustration. Hunter entered into a charter-party with a shipowner, who described himself therein as "C. J. Humble, Esq., *owner* of the good ship, or vessel, called 'The Anne.' " C. J. Humble was, unknown to Hunter, acting as agent for his mother, Grace Humble; and in an action by her on the charter-party, parol evidence was admitted at the trial, to shew that the son was acting on her behalf. The Court held, that this evidence was not admissible, because it contradicted the description given of C. J. Humble in the written document, and also because the third party has a right to the benefit he contemplates from the character, credit, and substance, of the party with whom he contracts. (*a*)

4. The principal is bound by all the equities which

(a) *Humble v. Hunter*, 17 L. J. Q. B. 350.

the third party would have against the agent.

Illustration. George, a clothier at Frome, employed Rich and Heapy in London, factors in woollen goods, as his *del credere* agents. Claggett & Co. bought a quantity of woollen cloths of Rich and Heapy, part of which were cloth goods of George's; but the whole quantity was taken out of a mass in Rich and Heapy's warehouse. Shortly afterwards Rich and Heapy became bankrupts, and George coming forward as their principal, sued Claggett & Co. for the price of their cloth. It was held that Claggett & Co. were entitled to set off against George's claim the amount of an acceptance of Rich and Heapy's in Claggett & Co.'s hands, which would have been available against Rich and Heapy in a claim made by them. (b)

- (ii) If an agent contracts with a third party, without the principal's authority, the principal (if existing at the time of the making of the contract) may, when the facts come to his knowledge, either repudiate, or adopt the contract.

Illustration. Wright held two promissory notes, a cheque, and an acceptance, of Marks'. Wright endorsed them to Ancona, and instructed a firm of solicitors to sue on them in Ancona's name. Ancona knew nothing of these proceedings until after action brought, when he adopted, and ratified them. It was held, that the action was properly brought in Ancona's name. (c)

(b) *George v. Claggett*, 7 T. R. 359.

(c) *Ancona v. Marks*, 31 L. J. Ex. 163.

2. *Liabilities of the principal.*

- (i) Where an agent contracts as principal, with a third party, the latter, on discovering the existence of the *hitherto undisclosed* principal, may elect to hold liable, either the principal or the agent.

Illustration. Curtis and Harvey sold some gunpowder to one Boulton. Boulton became insolvent, and Curtis and Harvey then discovered he had bought as agent for Williamson & Co. They filed an affidavit of proof against Boulton's estate, and brought an action against Williamson & Co. It was held, that they were entitled to make their election, as to whether they should look to the agent, or the principal, and that filing an affidavit of proof, was not such a step, as to shew a final election to look to Boulton. (a)

- (ii) The same rule applies, when the agent contracts as agent, but does not disclose his principal's name.

Illustration. McKune bought of Davenport certain glass and earthenware, under an order from Thomson, but did not mention Thomson's name at the time of the purchase. Davenport debited McKune, but before the credit expired the latter became bankrupt, and subsequently on Thomson's refusing to pay for the goods, sued the latter for the price. It was held that he was entitled to recover. (b)

- (iii) Where the agent has contracted, as agent, and *credit has been given to him, with the full knowledge* that he was only acting for a *disclosed* principal, the principal is not liable to the third party.

Illustration. Larazabal & Co., sent for certain goods of Addison's to their office. Gandasequi, a

(a) *Curtis v. Williamson*, L. R. 10 Q. B. 57.

(b) *Thomson v. Davenport*, 9 B. & C. 78.

Spanish merchant, there selected some of the goods, and made stipulations as to the price and other matters. Addison debited Larazabal & Co. the brokers, in his books and invoices, and the brokers credited him with the amount of the purchase-money, and debited Gandasequi with the same, and charged a commission. Larazabal & Co. became bankrupt. In an action by Addison against Gandasequi for the price, it was held, that the plaintiff could not now elect to hold the principal liable, as he had made his election once, at a time when he knew who the principal was, to give credit to the agent. (c)

- (iv) Where an agent has, without authority, entered into a contract with a third party on behalf of his principal; and the latter has subsequently, either expressly or by his acts, adopted the contract, he is liable to the third party.

Illustration. One Ebsworth, a broker, bought a quantity of wool of McClean for Dunn and Watkin, without their authority. They subsequently assented to the contract; but later on refused to accept and pay for the wool. In an action by McClean against Dunn and Watkin, it was held that they were bound by their subsequent assent to their broker's contract. (d)

- (v) Parol evidence (which, as a rule, cannot be given to contradict a written document), may be adduced to enable an undisclosed principal to sue; and *also* to charge him on a contract made on his behalf by his agent.

[It may be given to charge a *new* party, but not to *discharge* an apparent party.]

(c) *Addison v. Gandasequi*, 4 Taunt. 573.

(d) *McClean v. Dunn*, 1 M. & P. 761.

Illustration (a.) Higgins & Son sold, under a *written* contract, 1,000 tons of iron to John Senior & Co., iron merchants and iron commission agents. It was sought by the defendants in an action by Higgins & Son on the contract against Senior & Co. to give parol evidence to show, that the defendants had only contracted as agents for one Mead; but the court held, that it would not be admissible to *discharge* the defendants. (a)

(β.) Humfrey sold, through his brokers, Thomas and Moore, 10 tons of linseed oil to Dale, Morgan & Co., brokers for one Schenk, on a *written* contract, in which Dale & Co. professed to be acting as agents "for their principals." Schenk became insolvent, and did not accept the oil, and Humfrey & Co. sued Dale & Co., as on a sale of the oil to them. Evidence of a custom in the trade, that, when a broker purchased without disclosing the name of his principal, he was liable to be looked to as purchaser, was held to have been rightly admitted at the trial, for the purpose of *charging* the brokers. (b)'

(vi) The principal will not be responsible on a contract induced by the fraud of his agent, unless he authorizes it, or retains the benefit of it. (c)

3. THE AUTHORITY GIVEN BY THE PRINCIPAL TO THE AGENT MAY BE,

(i) *Express* (a.) By writing.

(β.) By parol (construed if ambiguous by the custom of the trade).

§ An express authority includes an implied authority to do all acts necessary to the effecting of the purpose for which that authority is given.

(a) *Higgins v. Senior*, 8 M. & W. 844.

(b) *Humfrey v. Dale*, 7 E. & B. 266.

(c) *Udell v. Atherton*, see *ante*, p. 72; *Swift v. Jewsbury*, L. R. 9 Q. B. 312.

Illustration. Howard saw at a riding school a horse of Steward's. It was warranted sound by Steward's brother, David, a horse dealer, who had brought the horse by Steward's instructions to the riding school for Howard's inspection, in order to negotiate a sale. Whereupon Howard bought the horse for £315. David had express orders not to give a warranty of the horse, but this fact was not imparted to Howard. On the horse turning out unsound, Howard sold it, and sued Steward for the loss on the resale. It was held, that David had an ostensible authority to do that, which was usual in the conduct of the business of a horse dealer, that this included the giving of a warranty, and that the plaintiff was entitled to recover. (d)

(ii) *Implied.* By the previous course of dealing between the parties.

§ The extent of the authority is measured by the extent of the agent's usual employment.

(a.) Where one accredits another by employing him repeatedly in any particular course of dealing, he is bound by the acts of that other, done in the seeming course of that employment.

Illustration. Robinson was a shopkeeper at Duffield, in Yorkshire. He employed one Womack, who lived in London, to order goods for him of Todd & Co., wholesale linendearers in London. Six parcels were so ordered and paid for by Robinson. Subsequently Womack fraudulently ordered more goods without authority, of which he got possession, and absconded. Todd & Co.

(d) *Howard v. Steward*, L. R. 2 C. P. 148.

sued Robinson for the price of these goods, and it was held, that the plaintiff could only look to the appearances held out to them by the defendants, and that they were entitled to recover. (a)

(β) Where one, by his conduct, holds out another as having a general authority to act for him, he is bound by the acts of that other, *notwithstanding* any private instructions to the contrary.

Illustration. Jones was a wholesale straw-hat maker at Luton, and had a branch business in Milk Street, E.C., carried on under the name of "Bushell & Co." Jones had agreed with one Bushell, that Bushell should act as his manager in Milk Street. He opened an account at the London and County Bank in the name of Bushell & Co., and gave Bushell an authority to draw cheques in the name of Bushell & Co., but no authority to accept bills. In July, 1864, Bushell accepted a bill in the name of the firm, payable at the bank. The bill was paid at maturity by Jones, but Jones forbade his accepting bills in future. Subsequently Bushell accepted three other bills in the same way, which were also paid at maturity; and, in consequence of this irregularity, Jones dismissed him. After this, Bushell negotiated another bill, accepted by the firm, with one Taylor, who discounted it with the London and County Bank. In an action by the Bank on this bill against Jones, it was held that he

(a) *Todd v. Robinson*, R. & M. 219.

could not by a secret reservation divest Bushell of the authority to draw and accept bills with which he had clothed him by holding him out as a principal in the firm of Bushell & Co. (b)

- (γ.) Where the authority of the agent is notoriously limited, the principal will not be liable on a contract made by him in excess of such authority.

Illustration. Ewing authorized a firm of insurance brokers at Liverpool to underwrite policies for him up to the amount of £100 on each vessel. There was a well-known custom at Liverpool, that there is, in all cases, a limit of some sort imposed on brokers by their principals. The brokers underwrote a policy for Baines, in excess of their authority, for £150. Baines did not know of, and did not enquire, as to limit. It was held in an action by Baines against Ewing on the policy, that the defendant was not liable. (c)

- (δ.) In certain cases an agent has *by custom* an implied authority to do certain acts on behalf of his principal.

For example. The master of a ship has an implied authority to bind the owners for the necessary repairs of the ship. (d)

And to pledge their credit for things absolutely necessary for the due prosecution of the voyage. (e)

A stockbroker has an implied authority from

(b) *Edmunds v. Bushell*, L. R. 1 Q. B. 97.

(c) *Baines v. Ewing*, L. R. 1 Ex. 320.

(d) *Weston v. Wright*, 7 M. & W. 396.

(e) *Robinson v. Lyall*, 7 Price, 592.

his client to deal in accordance with the custom of the Stock Exchange. (a)

§ OF THE RIGHTS AND LIABILITIES OF AN AGENT ON CONTRACTS
MADE BY HIM WITH THIRD PARTIES.

I. *Rights of the agent.*

1. When the principal is "disclosed" the agent cannot sue on the contract, unless he himself, either has an interest in, or is personally bound by, the contract.

Illustration. Williams, an auctioneer, was employed by one Crown to sell goods by auction on Crown's premises. Millington bought certain goods, and removed, but did not pay for, them. In an action by Williams against him for the price of the goods, it was held, that he had a possession, coupled with an interest in the goods, in respect of his right of lien for his charges, which entitled him to sue in respect of the price. (b)

2. Where the principal is "undisclosed" the agent may sue on the contract, unless the principal comes forward.

Illustration. Schmaltz & Co. entered into a charter-party with Avery, a shipowner, describing themselves as "agents of the freighter." In an action by them on the charter-party, it was held, that they were entitled to prove that they were their own freighters, and their own principals; and that they were entitled to recover in their own names. (c)

II. *Liabilities of the Agent.*

1. Where an agent contracts as principal with a third party, the latter, on discovering the existence of the hitherto

(a) *Grissell v. Bristowe*, L. R. 3 C. P. 112.

(b) *Williams v. Millington*, 1 H. Bl. 81.

(c) *Schmaltz v. Avery*, 16 Q. B. 655.

undisclosed or *unnamed* principal, may elect to hold liable either the principal or the agent. (*d*)

2. Where an agent contracts as agent, and there is no principal in existence at the time of the making of the contract, he is himself liable as principal.

Illustration. Baxter, Calisher and Dales, who were getting up a company to establish an hotel at Gravesend, purchased, and used, the stock of wines of Kelner "on behalf of the Gravesend Royal Hotel Company." About a month afterwards the company was incorporated, and shortly collapsed. In an action by Kelner for the price of the wines against Baxter, Calisher and Dales, personally, the Defendants contended that they were only acting as agents for the company, and were not personally liable; but the Court held, that the Plaintiff was entitled to recover. (*e*)

3. Where an agent has contracted as agent for an existing principal, who has, however, given the agent no authority, the agent is not liable *on the contract*.

But he is liable on an *implied promise* that he had the authority which he professed to have.

Illustration. Wright, believing he had authority from one Dunn-Gardener, agreed to grant a lease of a farm of Dunn-Gardener's in Cambridgeshire to Collen. Dunn-Gardener refused to execute a lease, and Collen sought specific performance against him, and on proof of the absence of due authority in Wright, was unsuccessful. Collen then sued the executors of Wright (who had died in the meantime) for representing that he had such authority, whereas he had none; and it

(*d*) See *ante*, p. 114.

(*e*) *Kelner v. Baxter*, L. R. 2 C. P. 174.

was held, that Collen was entitled to maintain an action for the breach of an implied promise to that effect. (a)

4. Where an agent signs a *written contract in his own name without qualification*, whether the principal be disclosed or not, he is liable.

Illustration. G. W. Winlow signed a charter-party in his own name. In the body of the document he was described as “agent for E. W. Winlow & Sons, of Devonport, merchants.” In an action by the ship-owner on the charter-party, G. W. Winlow was held to have pledged his personal liability, and that the words “agents for, &c.,” were mere words of description. (b)

Unless there are plain words in the body of the contract, to show, that he is contracting on behalf of a disclosed principal, and that he does not intend to be personally liable.

Illustration. Bowditch, a broker, signed, and sent to Southwell & Co, a note of a contract in the following terms: “I have this day sold by your order, and for your account, to my principals, five tons of anthracene. W. A. Bowditch.” In an action by Southwell & Co., for the price of the goods against the broker, it was held, that he was not personally liable on the above contract. (c)

[*NOTE.* Parol evidence cannot be given to discharge the agent from liability, by shewing that he was only acting as agent, when he has neglected to declare the agency in the document. (d)]

5. When from the circumstances of the case the fact of

(a) *Collen v. Wright*, 7 E. & B. 301.

(b) *Parker v. Winlow*, 7 E. & B. 942.

(c) *Southwell v. Bowditch*, 1 C. P. D. 374.

(d) *Higgins v. Senior*, see *ante*, p. 116.

agency is notorious, the agent will not be personally liable.

Illustration. Bridge was a solicitor, having conduct for the defendant, of the cause of House v. Leaky, at Taunton Assizes. He served a subpœna on one Thomas Robins, amongst other witnesses, to attend, and give evidence, on behalf of the defendant. Subsequently, on the death of Robins, his executrix sued Bridge for his expenses of attendance, and the court held, that the solicitor, being known merely as the defendant's agent, there was no implied contract on his part to pay the witnesses. (e)

6. The receipt by the agent is the receipt by the principal; and an agent cannot be sued for money paid to him, for which he is accountable to his principal.

Illustration. Bamford bought certain premises of one Stott, at auction. The memorandum of the sale was signed, and the deposit was received, by Shuttleworth, the vendor's solicitor, as agent for Stott. The sale having subsequently gone off, Bamford sued Shuttleworth for the deposit; but it was held, that there was no privity between the Plaintiff and Defendant, and that Stott only was liable to refund the money. (f)

7. If money is paid by a principal to his agent, for a third party, the agent is only responsible to his principle; and he is not liable to the third party, *unless* he has consented to hold it for the third party.

Illustration. Hill and Warren sold a quantity of wool to Kershaw, at Rochdale, who gave them his acceptance for £738 17s. 6d., at four months, in payment. On the day before the bill became due, Kershaw paid the amount required to meet the bill into his bankers,

(e) *Robins v. Bridge*, 3 M. & W. 118.

(f) *Bamford v. Shuttleworth*, 11 Ad. & E. 926.

Clement Royds & Co., who ordered their agents in London, the London and Westminster Bank, to pay the bill on presentation. Kershaw died on the following day, insolvent, and largely indebted to the bank. The bank by telegraph countermanded their order to the London and Westminster Bank. and refused to cash the bill, claiming to keep the money in their hands against their own debt. Hill and Warren, in consequence, who were the drawers of the bill, had to pay it, and filed a Bill in Equity against the bank, to make good the amount. It was held that (though Kershaw's representatives had a remedy), there being no privity between Hill & Warren and the bank, they were not entitled to maintain the suit. (*a*)

PARTNERSHIP.

§ PARTNERS [whether active or dormant] are the accredited agents of each other. (*b*)

§ Each has an implied authority to bind the other

1. By all simple contracts entered into in the *usual course of the business of the firm*.
2. By negotiable instruments circulated *on behalf of the firm*. (*b*)

[NOTE. One partner cannot bind another by deed [except a deed of release (*c*)], unless expressly authorized by deed to do so. (*d*), and see *ante*, as to agents, pp. 107, 111.]

§ THE RIGHTS AND LIABILITIES, THEREFORE, OF PARTNERS AGAINST, AND TO, THIRD PARTIES IS GOVERNED BY THE LAW RELATING TO PRINCIPALS AND AGENTS.

(*a*) *Hill v. Royds*, L. R. 8 Equity, 290.

(*b*) *Wheatcroft v. Hickman*, 8 H. L. C. 268.

(*c*) *Bailey v. Lloyd*, 7 Mod. 250.

(*d*) *Harrison v. Jackson*, 7 T. R. 207.

§ **PARTNERSHIP** is where two or more persons, standing to each other in the relation of principals, agree to combine property, skill, or labour for the purpose of a *common undertaking*, and the acquisition of a common profit.

§ A partnership *consisting of more than twenty members*, [and in the case of banking firms, of more than ten members,] must be registered under the Companies Act, 1862,

Unless—

1. It is formed in pursuance of some other act.
2. It is formed in pursuance of letters patent.
3. It is engaged in working mines within, and subject to, the jurisdiction of the Stannaries. (*e*)

§ **THE LIABILITIES INCIDENT TO PARTNERSHIP ARE EXCLUDED** [unless some further facts are shown], by “The Law of Partnership Act, 1865,” (*f*) from attaching in the following cases :

1. Where one lends money to another, for trading purposes, upon a written contract, that the lender shall receive—
 - (i) Interest varying with the profits, or
 - (ii) A share in the profits.
2. Where a servant, or agent, of a trader, is remunerated by a share in the profits of the trade.
3. Where the widow, or child, of the deceased partner of a trader, receives by way of annuity a portion of the profits of such trader’s business.
4. Where one has sold the goodwill of his business, and continues to receive a portion of the profits of such business as the price.

§ **THE LIABILITIES INCIDENT TO A PARTNERSHIP CEASE—**

1. *In the case of an ostensible partner,*
 - (i) By dissolving the partnership ;
 - (ii) Removing his name from the firm ; and
 - (iii) Giving notice of the dissolution

(*e*) 25 & 26 Vict.c. 89, s. 4.

(*f*) 28 & 29 Vict. c. 86.

- (*a.*) To the public, by notice in the Gazette (*a*) ;
- (*β.*) To those who have dealt with the firm, by special notice. (*b*)

2. *In the case of a dormant partner.*

- (i) By dissolving the partnership; and
- (ii) By giving special notice to any persons who have dealt with the firm with the knowledge that a secret partnership existed. (*c*)

UPON ALL CONTRACTS SUBSEQUENT TO THE DATE OF THE DIS-
SOLUTION OF PARTNERSHIP. (*d*)

- (*a*) *Godfrey v. Turnbull*, 1 Esp. 371.
- (*b*) *Graham v. Hope*, Peake, 208.
- (*c*) *Farrer v. Deffinne*, 1 C. & K. 580.
- (*d*) *Wood v. Braddick*, 1 Taunt. 104.

CHAPTER VIII.

CONTRACTS IN RELATION TO MARRIAGE.

§ **CONTRACTS IN UNREASONABLE RESTRAINT OF MARRIAGE** are void, as being contrary to public policy.

For example. If Miss Jones were, in consideration of an annuity paid by Mr. Smith, to covenant with him, that she would never marry anyone but Mr. Robinson, such a contract would be void. But if she were to covenant that, so long as the annuity were paid she would not marry Mr. Brown, such a contract would not be illegal.

§ **MARRIAGE BROKERAGE CONTRACTS** are void, as being contrary to public policy.

Illustration. The Duke of Hamilton, being anxious to marry the Lady Gerard, was induced by her guardian to promise to give a release, within two days after the marriage, of all accounts of the mesne profits of an estate belonging to the young lady. The marriage took place, and on the application of the husband, the Court of Chancery set the agreement aside, as void. (e)

§ **A FRAUDULENT REPRESENTATION BY A THIRD PARTY** made to bring about a marriage, will estop him from disputing, or denying the truth of, such representation, after the marriage has taken place.

Illustration. Moses Montefiori, in order to promote his brother Joseph's marriage, gave him a note for a large sum of money, as balance of an account between them; though, really, there was no such balance existing at all. The marriage was carried out, and Moses then demanded

(e) *Hamilton v. Mohun*, 1 Salk. 158.

back the note, as having been given without consideration; but it was held, that he could not take advantage of his own fraud, and that Joseph, though in collusion with him, was entitled to the note. (a)

§ A PROMISE IN CONSIDERATION OF MARRIAGE (other than the marriage contract itself) *must be in writing* (see *ante*, p. 41.)

[NOTE. The performance of the ceremony is no such "part performance" as to satisfy the Statute of Frauds.

Illustration. In 1852, the Rev. R. B. Caton, a widower, aged 80, proposed to Mrs. Henley, a widow, aged 60. A verbal agreement was made between them that the husband should have the wife's property for life, paying her £80 per annum pin-money, and that she should have it after his death. It was afterwards agreed that there should be no settlement executed, but that the husband should make a will leaving the wife all her property. The marriage took place, and the husband made his will accordingly. On his death a different will was found. Mrs. Caton filed a bill against the executors, praying for a declaration in accordance with this promise, and for an account. It was held, that there being no contract in writing to that effect, she must fail, as marriage was not a part performance within the meaning of the Statute of Frauds. (b)]

§ OF A PROMISE TO MARRY BETWEEN PRINCIPALS.

1. It need not be in writing

Unless the marriage cannot take place within a year. (c)

2. It must be, to marry within a reasonable time; otherwise it becomes a contract in unreasonable restraint of marriage, and therefore void.

(a) *Montefiori v. Montefiori*, 1 W. Bl. 363.

(b) *Caton v. Caton*, L. R. 1 Ch. 137.

(c) 29 Car. 2, c. 3, s. 4.

3. The plaintiff, in an action for breach of promise of marriage must be corroborated by some material evidence, other than his or her own word. (*d*)
4. A woman may break off her engagement if the man has conducted himself in a brutal or violent manner. (*e*)
5. A man may break off his engagement, if subsequently to his promise he discovers that the woman was, at the time of the promise, of loose character. (*f*)
6. Bodily disease, rendering it dangerous or impossible for the defendant to perform the functions of matrimony, is no answer to an action for breach of promise. (*g*)
7. If either party has been induced to enter into a contract of marriage by a fraudulent representation, to which the other is privy, the contract is *voidable*. (*h*)

§ HUSBAND AND WIFE.

1. The husband may take the *profits* of the wife's freehold estate.
But he may not convey away the estate itself, without her joining in the conveyance, and making an acknowledgment of the deed being her deed, and of her consent to its execution, before two commissioners appointed for that purpose under the "Fines and Recoveries Act, 1833." (*i*)
2. Marriage operates as a gift in law to the husband of all the wife's chattels real, and all her personal estate (in the absence of any settlement thereof to her separate use).
3. Also of all her choses in action.

(*d*) 32 & 33 Vict. c. 68. s. 2.

(*e*) *Leeds v. Cook*, 4 Esp. 254.

(*f*) *Foulkes v. Selway*, 3 Esp. 236.

(*g*) *Hall v. Wright*, E. B. & E. 746.

(*h*) *Wharton v. Lewis*, 1 C. & P. 529.

(*i*) 3 & 4 Will. 4, c. 74, ss. 77, 79, 80.

Provided, that he reduces them into his possession.

[That is, brings an action in respect of them, and obtains judgment and execution thereon.

He must sue jointly with his wife, and issue execution alone.]

§ If he fails to reduce them into his possession during his lifetime, the property in them remains in the wife, should she survive him.

4. A wife may bind her husband *by deed*, if he has given her a power of attorney to execute deeds as his agent.

5. She can also bind him by *a simple contract*, when acting, as his agent, with his authority.

For example. She may carry on a business as her husband's agent, draw, and accept bills, and buy goods in the course of such business; and bind him by all contracts, usual and necessary for the purpose.

§ THE AUTHORITY may be either—

(i) Express, or

(ii) Implied.

And the law as to implied authority, which applies to other agents, applies to the wife, subject to what follows hereunder.

§ OF THE IMPLIED AUTHORITY TO THE WIFE TO PLEDGE THE CREDIT OF THE HUSBAND.

I. WHEN THEY ARE LIVING TOGETHER—

There is a presumption of law that a woman living with a man, and represented by him to be his wife, has authority from him to bind him by her contracts for articles necessary and suitable to that station which he has permitted her to assume.

Illustration. Clark lived with Mary Steers [who passed as, but was not, his wife], and their children and servants in his house at Kensal Green. In January, 1823, he left England for the East Indies, leaving Steers and the family at

Kensal Green. During the time Clark was in England, Blades supplied certain goods to the house, on Steers' order, which were paid for by Clark; and after Clark had left, Blades continued to supply goods to Steers till August, 1825. Clark died in the East Indies in December, 1824. In an action by Blades against Clark's executor, it was held that the estate was liable for the goods supplied during Clark's absence up to the time of his death, when the implied authority was revoked. (a)

§ THIS PRESUMPTION MAY BE REBUTTED BY THE HUSBAND
SHEWING THAT HE HAS COUNTERMANDED HIS AUTHORITY.

Illustration. Etherington supplied Parrott's wife with stuff, which she made up into clothes. The wife was well supplied with clothes at the time, and Parrott had warned Etherington's servant, on paying for goods previously supplied, not to serve her any more. It was held, that the husband's assent to all contracts made by his wife for necessaries must be presumed, "unless the contrary appear." That here the contrary did appear, and that the husband was not liable. (b)

§ *Although the tradesman has no notice of the revocation of the husband's authority.*

Illustration. Rees was a gentleman of small fortune, living with his wife at Llanclly. The wife had separate income to the amount of £65, and he allowed her £50 as well, upon which two sums she clothed herself and her six children. He distinctly told her not to pledge his credit beyond this sum, and that if she wanted more, she was to apply to him. Jolly, a draper at Bath, supplied Mrs. Rees

(a) *Blades v. Free*, 9 B. & C. 167.

(b) *Etherington v. Parrott*, 1d. Raymond, 1006.

with wearing apparel to the amount of £20 8s. 4d., and sued the husband for the amount. The jury found, in addition to the foregoing facts, that the goods supplied were necessaries, that the £50 was not paid regularly, and that Jolly had no notice of the revocation of the husband's authority. The court, nevertheless, held that the husband was not liable. (a)

[NOTE. (i) If the husband sees the wife dressing extravagantly, and takes no notice of it, there will be evidence for the jury of his assent to, and consequently, of a ratification of the purchase, notwithstanding that he may, by giving her an allowance for dress, have countermanded the authority to pledge his credit. (b)

(ii) And, if by paying previous bills he has led the tradesman to believe that the wife has his authority, there will have been such a holding of the wife out as his agent as to prevent the husband from setting up a secret revocation of his authority. (c)]

§ IT WILL BE A QUESTION FOR THE JURY—

1. Whether the goods supplied are necessaries suitable to the wife's station.
2. Whether she had, or had not, authority from her husband to bind him by the contract.
3. Whether the husband subsequently ratified the contract by tacitly recognising the fact that the goods had been supplied.

§ THE BURTHEN OF PROOF in the *first* and *third* cases will be on the creditor.

In the *second* on the husband.

(a) *Jolly v. Rees*, 15 C. B. N. S. 628; and see *Debenham v. Mellor*, 28 W. R. 501.

(b) *Waithman v. Wakefield*, 1 Camp. 121.

(c) *Debenham v. Mellor*, 28 W. R. 501.

II. WHEN THEY ARE LIVING APART.

§ **HERE THE PRESUMPTION OF LAW** is *primá facie* that the wife has no authority to pledge her husband's credit.

§ **THE PRESUMPTION MAY BE REBUTTED** by the creditor shewing that an authority existed; and this will depend on the circumstances under which they are living separate.

1. *When they are living apart by MUTUAL CONSENT*, the wife has an implied authority to pledge her husband's credit for articles necessary and suitable to her condition;

Unless—

- (i) The husband *by agreement* with the wife, makes and pays her an allowance, no matter how inadequate, or
- (ii) She has an income *aliunde*, and *agrees* not to require an allowance.

Illustration. Burchell and wife executed a deed of separation, by the terms of which the wife retained the income of certain property settled to her separate use, which it appeared amounted to about £300 per annum, and her husband covenanted to pay her £20 per annum towards the maintenance of three of the children of the marriage (who were to remain with the wife) until they were twenty-one. The husband duly paid the £20 per annum. The wife ran up a bill for butcher's meat with Eastland, who sued Burchell in the County Court for the price. The Court held, that as the terms upon which the husband had consented to the wife living apart were that she should not look to him

for more than £20 per annum, no authority to spend more could be implied. (a)

Except where the wife has been put to expense in protecting herself from the husband's own violence. For, whatever the amount of the wife's means, the husband has no right to diminish it by his own misconduct. (b)

[**NOTE.** Notice to the creditor that the wife has an allowance is unnecessary.

Illustration. Pick was living in adultery apart from his wife. He allowed her a sufficient sum for her maintenance, which was duly paid. Mizen supplied the wife with board and lodging, and sued Pick for the price thereof. He had no notice that Mrs. Pick had a separate allowance. The court held that the absence of notice was immaterial, and that the plaintiff could not recover. (c)]

§ **IT WILL BE A QUESTION FOR THE JURY.**

- (i) Whether the husband and wife are living apart by *mutual consent*.
- (ii) Whether, by the terms of the agreement to live apart, the wife has promised not to pledge her husband's credit.
- (iii) Whether, if the husband has agreed to make his wife an allowance, he has duly paid it.
- (iv) Whether the goods supplied were articles necessary and suitable to the wife's degree.

§ **THE BURDEN OF PROOF** in cases (i) and (iv) lies on the plaintiff. In cases (ii) and (iii) on the husband.

(a) *Eastland v. Burchell*, 3 Q. B. D. 432.

(b) *Turner v. Rookes*, 10 A. & E. 47.

(c) *Mizen v. Pick*, 3 M. & W. 481.

2. *When they are living apart, otherwise than by mutual consent.*

(i) *There is a presumption of law* that the wife has authority to pledge her husband's credit for articles necessary and suitable to her degree,
[And this presumption may not be rebutted.]

(a.) Where the husband unjustly expels his wife from the house.

(β.) His own illtreatment of her renders it impossible for the wife to remain under his roof.

Illustration. Prentice and wife lodged with one Bolton, who supplied the wife with goods. Prentice forbade him to do so again, paid him, and left his house. About a year afterwards, Prentice refused to maintain his wife any longer, and left her; Bolton thereupon furnished her with suitable necessities, and sued Prentice for the price. The court held that the husband was liable. (d)

[NOTE. Where the wife has been compelled to leave her home by the cruelty of the husband, she is not bound to return to him upon his invitation; and his liability continues.

In order to determine his liability, he must apply to the Divorce Court for a restitution of conjugal rights. And that court will then either make a decree in that behalf, or order a judicial separation, according as it is convinced that the cruelty will, or will not, continue. (e)

(d) *Bolton v. Prentice*, Stra. 1214.

(e) *Emery v. Emery*, 1 Y. & J. 505.

Illustration. Emery continually illtreated his wife. On one occasion he struck her, and on another beat her so brutally, at the same time abusing her, and swearing he would run her through the body, that she left his house that night, almost in a state of nudity. Subsequently she went to her father's, who sued Emery for the cost of her board and lodging. It was proved that the husband was anxious for her to return home. The court held that she was not bound to return if she had reasonable fear for her personal safety, and that the husband was liable for her support. (a)]

- (ii) *Where the wife leaves the husband*, and he is willing that she should live with him, she carries with her no authority to pledge his credit in any way. (b)

3. *Where a judicial separation has been decreed.*

- (i) If the court awards alimony,
The wife has no authority to pledge her husband's credit.

Unless the alimony is not paid, in which case her right to pledge his credit revives. (c)

- (ii) If the court does not award alimony,
The wife occupies the position of a *feme sole*, and the husband is not responsible for her contracts. (c)

§ **FUNERAL EXPENSES** of the wife, the husband is in all cases liable for. (d)

(a) *Emery v. Emery*, 1 Y. & J. 505.

(b) *Hindley v. Lord Westmeath*, 6 B. & C. 200.

(c) 20 & 21 Vict. c. 85, s. 26.

(d) *Ambrose v. Kerrison*, 10 C. B. 776.

CHAPTER IX.

INSTRUMENTS NEGOTIABLE BY INDORSEMENT
AND DELIVERY.

I. A BILL OF EXCHANGE is an unconditional order in writing from one to another to pay a specified sum to a third.

Or, it may be, to someone indicated in writing on the back of the bill by that third party (or, as it is commonly called, "to his order.")

Or, again, it may be to "the bearer."

1. The party addressing the order to the second party is called the "*drawer*," because he is said to "draw" the bill.

2. The party to whom the order is directed is called the "*drawee*," because it is he on whom the bill is drawn.

§ When the drawee has the order directed to him brought to his notice, he may either repudiate it, or he may recognise the obligation to observe such order.

If he takes the latter course, he writes his name across the bill, and this is called "*accepting*" the bill; he then becomes the "*acceptor*," and the bill becomes his "*acceptance*."

3. The party to whom the drawer directs the drawee to pay the amount specified is called the "*payee*."

4. Without further orders than to pay this third party, the acceptor can pay him, and him only; and the bill is not transferable or negotiable.

§ If, however, the direction is to pay the third party, "or his order," the acceptor must pay either him, or the person nominated or "ordered" by him to receive the money in his place.

§ A person so nominated is called the "*indorsee*," because he acquires his right to receive the money from the acceptor by virtue of the payee "*indorsing*" his own name on the back of the bill (thereby becoming the "*indorser*"), with a further direction to pay the amount of the bill to his nominee.

(i) If the indorser directs payment to a specified person, the bill is said to be "*pecially indorsed*."

(ii) If he merely writes his name on the back, and makes no further direction, the bill is said to be "*indorsed in blank*," and is payable to anyone who presents it. "The bearer."

(iii) As soon as the payee has indorsed the bill it becomes transferable; if specially, to the special indorsee; if in blank, to and by all the world.

5. The "holder" is the party who has possession of the bill, and has a present right to sue the parties to it.

§ No one but the holder can bring an action on a bill of exchange.

6. Bills of exchange are either—

(i) Inland; that is, drawn and payable within the United Kingdom (*a*), or

(ii) Foreign; that is, drawn, or payable, or both, beyond the United Kingdom.

[NOTE. Bills of exchange were invented by merchants as a convenient way of assigning a debt.

The following is a very simple example of the way in which this is effected.

Example. Smith, a maker of steel rails in England, sells and despatches a cargo of steel rails to Jones, a contractor in the United States. The price is

(a) 19 & 20 Vict. c. 97, s. 7.

£5,000, and one way, both a risky and a costly one, of paying the price would be, for Jones to remit to Smith by the next mail steamer gold coin to the amount of £5,000. It happens, however, that Smith owes £5,000 to Brown, also in the United States; in which case, it is obviously more convenient for Jones to pay £5,000, the price of the rails, to Brown; and then Smith's, Brown's, and Jones' accounts will be square. In order to effect this Smith, on shipping the rails, draws a bill on Jones for £5,000 "against the rails," directing Jones to pay £5,000 to Brown, and sends the draft by post to Brown. Brown will then present the draft to Jones for acceptance, who will accept it, and pay it, if payable at sight, immediately; if payable at a later date, upon its being presented for payment after that date.

Now, if the bill were drawn by Smith *to Brown's order*, Brown, on receiving it, might "put it in circulation" by indorsing his name on the back, and handing it to anyone who would give him cash for it. It would then be the duty of *the bearer* to present the bill to Jones for acceptance; and then, again, if the bill were payable at some subsequent date, and were passed on to others, for whoever was the bearer, at the time the bill became due, to present it to the acceptor for payment.

Or again, instead of indorsing the bill in blank, Brown might have indorsed it to the order of Black, Black might have indorsed it to the order of Green, Green to the order of White, White to the order of Grey, and so on until the time during which it was current had expired. Each transferor receiving cash in exchange for the bill from his

immediate transferee. The following would be the form of such a bill of exchange, before acceptance:—

Stamp.

1 April, 1880.

Two months after date (or at sight) pay to the order of John Brown, Esq., the sum of £5,000.

To Mr. William Jones.

THOS. SMITH.]

§ THE CHARACTERISTICS OF A BILL OF EXCHANGE ARE—

1. That it is a contract, which is assignable at law.

[NOTE. The transfer is made—

(i) By indorsement and delivery, when the bill is drawn “to order.”

(ii) By delivery only, when drawn “to bearer.”]

2. That the law presumes, that consideration has been given for it, until the contrary appears.

§ OF THE NATURE OF THE LIABILITY OF THE RESPECTIVE PARTIES TO A BILL OF EXCHANGE.

1. The promise of the acceptor is an *absolute* promise to pay the bill, when duly presented.
2. The promise of the drawer is a *conditional* one to pay, if the acceptor does not.
3. The promise of the indorser is the same; he being, as far as his next indorsee is concerned, in the same position as the drawer, in regard to him, the indorser.
4. And so is the promise of each subsequent indorser, as far as each next indorsee is concerned.
5. The acceptor is primarily liable to the holder, and each indorser, beginning with the latest, and going back to the first, and finally the drawer, is in the position of a *surety*, who promises to pay if the principal debtor (the acceptor) does not.

II. A **PROMISSORY NOTE** is an absolute promise in writing to pay a specified sum on or before a day named, or on demand, or at sight, to another, his order, or bearer.

The person giving a promissory note, is called the “maker.”

The following is a form of a promissory note :—

Stamp.

I promise to pay Mr. John Jones, or his order, the
sum of £100 in two months from the date hereof.

1st April, 1880.

WILLIAM SMITH.

[NOTE. A promissory note was not transferable at common law, but it was made so, in conformity with a bill of exchange, by 3 & 4 Ann. c. 9.]

§ A **BANK NOTE** is a promissory note, given by a bank to the public, and the sum mentioned in it is payable on demand, to the bearer, on presentation at the bank.

§ An **I.O.U.** is not a promissory note, and is not transferable. It is merely evidence of the admission of a debt; what is called “an account stated.”

III. A **CHEQUE ON A BANKER** is, substantially, an inland bill of exchange, payable on demand, drawn on the banker by his customer, and may be made payable either to order, or to bearer.

§ The banker is in the position only of a drawee, who has not yet accepted a bill, and so cannot be sued by the payee.

[§ IT DIFFERS FROM A BILL OF EXCHANGE—

(i) In the amount of the stamp impressed on it. A cheque on a banker only bearing duty to the amount of one penny and no more, whatever the amount, for which it is drawn. Whereas a bill of exchange bears an *ad valorem* stamp.

(ii) It must be payable on demand, and not on a day later than the date of issue.

If a cheque is post dated, it is the same thing as a bill of exchange, at so many days date as intervene between the delivery of the cheque and the date marked on it. (a)]

1. A banker is bound to honour his customer's cheque, so long as he has funds to meet it of the customer's in his hands; and is liable to an action, if he does not, for damaging his customer's credit.
2. If a banker pays a forged cheque, the loss is his, and not that of his customer whose name has been forged.
3. But he is not responsible to the customer, if he pays on a forged indorsement. (*a*)
4. Payment by cheque is a good payment—
 - (i) If the cheque is honoured; and,
 - (ii) It comes into the hands of the payee.

§ **CROSSED CHEQUES.** A cheque may, for greater security, be

1. "Crossed." That is to say, two parallel lines may be drawn across the face of it, between which are written
 - (i) The words "and Company" (a general crossing).
 - (ii) The name of a particular banker (a special crossing).

And where this is done, it is the duty of the banker, on whom the cheque is drawn, only to pay it to—

- (i) Another banker (if it is crossed generally).
 - (ii) To the specified banker (if it is crossed specially). (*b*)
2. The words "not negotiable" may also be written across the face of a cheque, in addition to a general or special "crossing." Any person taking such a cheque can neither obtain nor transfer a better title to it than the party had from whom he took it. (*c*)

[**NOTE.** The effect of this will be, that no person taking a cheque crossed "not negotiable" from one who has improperly obtained it, will be able to plead that

(*a*) 16 & 17 Vict. c. 59, s. 19; and see 39 & 40 Vict. c. 81, s. 11, as to forged "crossings."

(*b*) 39 & 40 Vict. c. 81, ss. 4, 7.

(*c*) *Ibid*, ss. 4, 12.

he is "a holder for value *without notice*," (see *post*) or become the "true owner" of the cheque.]

3. A banker, on whom a cheque is drawn, who pays it otherwise than as directed by the crossing, is liable to the "true owner" for any loss the latter may sustain. (*d*)
4. A cheque, which has been issued uncrossed, or only crossed generally, may be subsequently crossed, either generally or specially, by the lawful holder. (*e*)
5. A cheque may not be crossed specially to more than one banker, except when crossed to an agent for collection by the banker to whom it is first specially indorsed. (*f*)
6. A banker who collects for his customer a cheque crossed generally or specially, is not liable to the true owner should the customer's title to such cheque prove defective. (*g*)

CONSIDERATION.

§ **CONSIDERATION** is presumed. That is to say, in an action on a negotiable instrument, there is a presumption that consideration has been given for it, and the plaintiff will not be put to the proof thereof.

Unless the defendant can make out a *prima facie* case that,—

1. The bill or note was obtained by undue means, such as fraud, or force; or,
2. That the consideration for which it was given is infected with illegality; or,
3. That the bill was lost or stolen.

§ If the defendant makes out a *prima facie* case, im-

(*d*) 39 & 40 Vict. c. 81, s. 10.

(*e*) *Ibid*, s. 5.

(*f*) *Ibid*, ss. 5, 8.

(*g*) *Ibid*, s. 12. *Matthiessen v. London and County Bank*, 4 C. P. D. 7.

pugning the bill or note, as above, then the plaintiff is at once put to prove that he or those through whom he claims, have given consideration for the document.

Illustration. Bidwell, who was insolvent, presented a petition to the Bankruptcy Court, and gave a promissory note to E. C. Bailey, one of his creditors, in consideration of the latter agreeing not to oppose the petition. The consideration was of course illegal. E. C. Bailey indorsed the note to J. Bailey, who sued Bidwell thereon. Bidwell at the trial having given proof of the above-mentioned facts, it was held, that, thereupon, the onus of proving that he had given value for the note, was transferred to the plaintiff. (a)

§ Even if the plaintiff proves, that he gave consideration for the bill, or note, he will, nevertheless, not be entitled to recover, if he took it *with notice* of the infirmity of title, with which the bill, or note, was affected.

§ The onus of proving that the plaintiff had such notice, lies on the defendant. (b)

§ In order, therefore, to be the lawful holder of a negotiable instrument, and so, entitled to recover upon it, the plaintiff must be—

1. A holder for value; and
2. Without notice of any infirmity in the title to the bill or note.

And if he is a holder for value, without notice, his title is *unimpeachable*.

§ NOTICE OF SUCH INFIRMITY OF TITLE MAY BE—

1. Direct.
2. Implied.

(a) *Bailey v. Bidwell*, 13 M. & W. 73.

(b) *Oakley v. Ooddeen*, 2 F. & F. 656.

Illustration. John Gomershall and James Francis Gomershall carried on business at Dewsbury, and they, and one Searby, in London, established a system of making accommodation bills, by drawing bills on each other, and getting them discounted. Both they and Searby knew they were one and all insolvent, and were contemplating bankruptcy. Some of these bills, amounting to £1,727 were bought by Jones for £200. He knew at the time that the Gomershalls were in embarrassed circumstances. He also knew that certain persons could give him full information as to their affairs, but he made no enquiries of them. On the Gomershalls' becoming bankrupt, Jones sought to prove against their estate for the £1,727, but his proof was objected to by the trustee in bankruptcy. It was held, that the objection was a valid one, and Jones should only be allowed to prove for the £200, the sum actually paid by him for the bills; and that wilful abstinence from inquiry, where the holder has a suspicion that the bill may not be quite right, is equivalent to notice. (c)

PRESENTMENT FOR ACCEPTANCE.

§ A bill may be drawn payable—

1. On demand, or at sight (which are the same). (d)
2. A certain time after sight.
3. A certain time after date.

§ When the drawer has delivered a bill to the payee, the latter may either—

(c) *Jones v. Gordon*, 2 Ap. Ca. 616.

(d) 34 & 35 Vict. c. 74.

1. Put the bill in circulation, or
 2. Present it for acceptance to the drawee, or his authorized agent.
- § If the payee has put it into circulation, the *holder* may present it for acceptance.
- § A bill should be presented for acceptance without delay.
[For, if accepted, the holder obtains the additional security of the acceptor.
If not accepted, the antecedent parties become at once liable upon it.]
- § If a bill be drawn, payable on demand, or at a certain time after sight, it must be presented for acceptance within a reasonable time.

ACCEPTANCE.

- § This is a promise by the drawee to pay the bill when due.
It must be—
1. In writing. (*a*)
 2. Signed. (*a*)
 3. By the drawer, or his authorized agent. (*a*)
 4. Delivered or handed over to the party presenting it.
- [NOTE. Until handed over, the acceptance may be cancelled. (*b*)]
1. A bill may be accepted at any time, so long as it is in existence.
 2. If accepted before it is filled up, it will be for any amount covered by the *ad valorem* stamp.
 3. If after the date at which it becomes payable it becomes payable by the acceptor on demand.
 4. An acceptance may be—
 - (i) Conditional, as “accepted, payable on giving up the bill of lading.”

(*a*) 19 & 20 Vict. c. 97, s. 6 ; 41 Vict. c. 13.

(*b*) *Van Diemens Bank v. Victoria Bank*, L. R. 2 P. C. 28.

(ii) Partial. As when the bill is drawn, say for £100, and it is accepted to the extent of £80.

5. *Waiver.* Contrary to the law applicable to contracts generally (see *ante*, p. 28), an acceptance may be waived *after breach*, merely by an express renunciation of his claim by the holder. (c)

PRESENTMENT FOR PAYMENT.

1. May be made, either to the acceptor himself or to his duly authorized agent for payment.
2. If a bill of exchange is accepted, payable at a particular place *only*, presentments for payment must be made at that place in order to charge the *acceptor*. (d)
3. If the acceptor or the drawer has given even a general direction as to the particular place at which the bill will be payable, presentment must be made at that place, in order to charge the *drawer* or the *indorser*. (e)
4. *Three days of grace* are allowed by the custom of merchants beyond the date when the bill or note is actually due.
Unless it is payable on demand.
[Thus a bill drawn on January 1, at three months, will be payable, counting the days of grace, on April 4th.]
5. Bills or notes payable *on demand* must be presented for payment within "a reasonable time."
6. What is "a reasonable time," is a question of law for the court, *depending on the facts of each case*. (f)
7. *Promissory notes, payable on demand*, are often given as a *continuing security*. Interest is sometimes regularly paid on them, from time to time. Bank notes are intended to circulate as long as possible, so that, in such

(c) *Foster v. Dawber*, 6 Ex. 851.

(d) 1 & 2 Geo. 4, c. 78.

(e) *Gibb v. Mather*, 8 Bing. 214.

(f) *Tindal v. Brown*, 1 T. R. 168.

cases, "a reasonable time" may be a period of considerable duration. (a)

8. If a bill or note be not duly presented for payment, all the antecedent parties are discharged, *except* the acceptor. [For delay in presenting for payment may work an injury upon the drawer and indorsers, by deterring them from dealing with the acceptor, until it is too late. And it is only reasonable that the party, by whose negligence they are put in a worse position, should lose his remedy against them.]

SUSPENSION.

- § Where a bill is renewed, that is, where a fresh bill is given in substitution of the original one, the debt is suspended until the substituted bill is matured. (b)

[NOTE. The result of this is, that all the indorsers are discharged; (c) they being in the position of sureties for the principal debtor, the acceptor, to whom time has been given by the holder renewing the bill. (See *ante*, p. 97).]

NOTING AND PROTESTING OF FOREIGN BILLS.

2. *Noting* is a minute, made by a public notary, on a foreign bill (the acceptance or payment of which has been refused), of the date of dishonour.
 - § It should be made on the day of dishonour.
 - § It is a preliminary step to protesting.
2. *The protest* is a solemn declaration of the fact of dishonour, written by the notary, on a fair copy of the bill.

(a) *Chartered Mercantile Bank of India v. Dickson*, L. R. 3 P. C. 574.

(b) *Kendrick v. Lomax*, 2 C. & J. 405.

(c) *Gould v. Robson*, 8 East, 576.

§ The protest may be drawn up at any time.

[NOTE. (i) *Acceptance*, and (ii) *payment for honour* (or *supra protest*).

§ Is where upon the dishonour of a bill a stranger comes forward, and, on the bill being protested, either (i) accepts, or (ii) pays the bill "for the honour," or to protect the credit (i) of the drawer, or (ii) of the acceptor, as the case may be.]

NOTICE OF DISHONOUR.

§ The holder of a negotiable instrument dishonoured, either as to acceptance or payment, must give notice of the dishonour to the antecedent parties.

1. It may be written or verbal.

2. It must express (*d*)

(i) What the bill or note is ;

(ii) That it has been dishonoured ;

(iii) A demand for payment.

3. It may be sent by post

4. To the place of business, or residence, of the party addressed

5. Within a reasonable time.

(i) Where the parties reside in different places, the notice must be sent off on the following day.

(ii) Where in the same place, it must be sent, so as to arrive on the following day.

6. By the actual holder or his agent.

7. To either

(i) All antecedent indorsers, and the drawer ; or

(ii) To the immediate antecedent indorser only.

[In which case the latter must transmit the notice to his immediate antecedent indorser, and so on, till the notice reaches the drawer.

§ Each party is bound to transmit the notice without delay. For, by any unreasonable delay, all remedy against the parties, not duly advised, will be gone.

§ Every one whose name is on the bill, who has not received due notice of dishonour, is discharged from all liability on the bill.

Except a drawer who has no effects in the hands of the drawee. And he does not require notice of dishonour, because he must know beforehand that the bill will not be honoured. (a)]

ALTERATION OF BILLS AND NOTES.

§ An alteration *in a material part* avoids a bill or note.

1. At common law. (b)

2. Under the Stamp Acts.

§ For the alteration in effect makes the bill a new instrument, and a fresh stamp is required.

Unless (i) It is made before the bill or note is issued;
or

(ii) It is made to correct a mistake.

Illustration. On November 8th, 1865, Cornwell made a promissory note for £125, payable to Aldous, and expressing no time for payment. Aldous, on getting possession of it, added the words "on demand." It was held, in an action on the note by Aldous, that the alteration was immaterial, as it only expressed in terms the original effect of the note. (c)

(a) *Carew v. Duckworth*, L. R. 4 Ex. 313.

(b) *Davidson v. Cooper*, 13 M. & W. 343.

(c) *Aldous v. Cornwell*, L. R. 3 Q. B. 573.

FORGERY OF BILLS AND NOTES.

1. Even a holder for value without notice cannot sue on a forged bill or note.
2. The acceptor, or maker, who pays on a forged bill or note, is not discharged from the debt, for which such bill or note was given.

Unless the drawer, by his own negligence, himself facilitated the committing of the forgery.

Illustration. Young, who banked with Grote & Co., had occasion to leave home, and left with his wife three cheques out of his cheque book (signed, but not filled up as to amount), instructing her to fill up and cash them as they were required. The wife filled up one of the cheques for £50 2s. 3d., but so wrote it, that one Worcester, to whom she gave it, was able to insert the word and figure 3 before the word and figures 50, and so to obtain cash from the bank for £350 2s. 3d. It was held that Young, having by his negligence put it in the power of Worcester to commit the forgery, he, and not the bank must bear the loss. (*d*)

IV. A **BILL OF LADING** is a document acknowledging the due receipt by the shipowner, or his captain, of the merchandise delivered to him by the shipper for transport in a *general* ship (that is, a ship which carries the goods of various merchants, and is not chartered by one man for his own cargo alone), signed and handed by the captain to the shipper. After acknowledging the due receipt of the goods, it mentions their destination, and the shipowner's undertaking to deliver them safely to the consignee or his assigns, on payment by him or them

(*d*) *Young v. Grote*, 4 Bing. 253.

of the freight, and is commonly made out in triplicate; one part being sent by post to the consignee of the goods, one being retained by the shipper, and the third given to the captain.

A bill of lading is transferable by indorsement and delivery and the property in the goods mentioned therein, and the right to sue in respect of them, passes thereby to the indorsee. (a)

(a) 18 & 19 Vict. c. 111, s. 1.

CHAPTER X.

LANDLORD AND TENANT.

§ THE CONTRACT BETWEEN LANDLORD AND TENANT is one, by which the landlord, in consideration of a rent paid by the tenant, permits the latter to enjoy his, the landlord's, lands or houses.

1. *Demise*. The landlord is said to "demise," or let, the property to the tenant.

§ When the period of letting has expired, the immediate enjoyment of the property "reverts" to the landlord.

2. *Reversion*. The landlord's interest in the future enjoyment of the property at the termination of the tenancy.
3. *A lease* is a conveyance by way of demise of land or tenements for life, or lives, or for years, or at will.

§ DIFFERENT KINDS OF TENANCIES FOR YEARS.

1. *A tenancy for more than three years* must be made by deed. (b)

[NOTE. 1. A lease for more than three years, not made by deed, will operate as an agreement to grant a lease. (c)

§ And specific performance of it will be granted.

NOTE 2. *If a tenant enter into possession under a void lease in writing, he becomes, on payment of rent, a tenant from year to year on all the terms of the lease, not inconsistent with a yearly tenancy.*

Illustration. By an agreement in writing, Martin let to Smith a dwelling-house and premises for seven

(b) 8 & 9 Vict. c. 106, s. 3 ; 29 Carl. 2, c. 3, s. 1.

(c) *Parker v. Taswell*, 2 De G. & J. 559.

years upon certain terms, one of which was, that Smith should, in the last year of the term, paint, grain, and varnish the interior, and also whitewash and colour. Smith remained in during the seven years, and at the expiration of that time went out, and refused to do the painting, &c. In an action by Martin for these repairs, it was held that, though the lease was void as a lease, by reason of its not being by deed, still, as Smith occupied year by year till the seven years had expired, he was bound to fulfil his agreement as to the repairs; the agreement substantially being, that if he should occupy so long as seven years, he would, at the end of that time, do certain painting, &c. (a)]

2. *A tenancy for less than three years, and more than one*, must be in writing in order to be enforced; as by sect. 4 of the Statute of Frauds, no action can be brought whereby to charge any person on a contract relating to the transfer of an interest in land, unless a memorandum of it has been made in writing. (b) [See *ante*, p. 41.]

3. *A tenancy from year to year* is implied by law from the fact of the tenant entering on the premises and paying some portion of an *annual* rent to the landlord.

Illustration. Start agreed with Foster to take a house for *twenty guineas a-year*, the rent to be paid weekly, and either party to be at liberty to give a three months notice from any quarter-day. Start occupied for more than a year, and paid a year's rent. It was held that he was a yearly tenant. (c)

§ A tenancy from year to year will continue to run until terminated by a lawful notice to quit.

(a) *Martin v. Smith*, L. R. 9 Ex. 50.

(b) 29 Carl. 2, c. 3, s. 4.

(c) *Ree v. Hurstmonceaux*, 7 B. & C. 551.

§ *Notice to quit*, in the case of a yearly tenancy, must (in the absence of any agreement to the contrary) be given six months before the expiration of, and terminating with, the current year of occupation.

For example. If Smith holds a house of Jones as a yearly tenant from January 1, 1880. Should Jones in July, 1882, desire to get rid of him, he must give him a six months notice, on or before June 30th, 1883, to quit on December 31st, 1883, because that will be the earliest date at which he can give him a clear six months notice, which will terminate at the end of a *current* year.

4. *A tenancy for less than a year* may be half-yearly, quarterly, monthly, or weekly, according as

- (i) A half-yearly, quarterly, monthly, or weekly, notice to quit is stipulated for.
- (ii) The rent reserved is payable half-yearly, quarterly, monthly, or weekly.
- (iii) There may be any *custom* regulating the period of tenancy in any particular case.

Provided, that no *annual* rent is reserved.

Illustration. Derrett became tenant to Kemp under an agreement "that he should always be subject to notice to quit at three months notice." This was held to be a quarterly tenancy. (d)

§ **NOTICE TO QUIT** must terminate with the *current* half year, quarter, month, or week, as the case may be.

5. *A tenancy at will*, is where the premises are let to the tenant to hold at the will of the lessor.

It is created by a permission by the lessor to the tenant to occupy.

§ As soon as any portion of an *annual* rent is received by the lessor, the tenancy becomes one from year to year.

(d) *Kemp v. Derrett*, 2 Camp. 509 ; and see *Rex v. Hurstmonceaux*, *ante*, p. 154.

§ A TENANCY AT WILL IS TERMINATED.

- (i) By a demand of possession, no notice to quit being required.
- (ii) On the doing of any act, either by the lessor or the lessee, inconsistent with an estate at will.

For example. Acts of ownership exercised on the premises by the lessor. Waste committed by the tenant. (See *post*, Book III. Part I. Chap. II.)

6. *A tenancy on sufferance*, as it is called, is in fact no tenancy at all.

It is a holding by the tenant *against* the will of the landlord, and is an adverse possession.

For example. When a tenant "holds over;" that is, remains in possession of the premises after the expiration of the lease.

7. *Use and occupation.* When the premises have been used and occupied by permission of the owner, but without any agreement as to rent, a quasi-tenancy arises, and the law implies a promise on the part of the occupier to reasonably compensate the owner for such use and occupation.

§ This presumption may be rebutted by shewing that the premises were occupied against the will of the owner; the occupier would then be a trespasser, and no contract could be implied between him and the owner.

§ THE MATERIAL TERMS, WHICH MUST BE CONTAINED IN A MEMORANDUM OF AGREEMENT FOR A LEASE (see *ante*, pp. 46, 153, 154) ARE—

1. The name of the lessor, or his agent.
2. The name of the lessee, or his agent.
3. Some definite description of the property demised.
4. The length of the term.
5. The date of the commencement.
6. The amount of the rent (and of the premium, if any).

7. Any special covenants, beside the *usual* ones [which are *implied* as part of the contract].

§ USUAL COVENANTS ARE—

- (i) To pay rent.
- (ii) To repair.
- (iii) For quiet enjoyment.
- (iv) A proviso for re-entry on non-payment of rent.

§ SPECIFIC PERFORMANCE OF A *parol* AGREEMENT FOR A LEASE WILL BE GRANTED, where under the *parol* agreement the owner has allowed the tenant to enter, and to make a special outlay on the land on the faith of the *parol* contract.

Illustration. Davenport verbally agreed to let Farrell a farm for fourteen years. On the faith of this agreement Farrell took possession, and expended a considerable sum of money in making improvements. Davenport subsequently refused to grant a lease, and gave Farrell notice to quit. The Court granted specific performance of the *parol* agreement. (a)

§ THE OBLIGATIONS OF THE LESSOR AND LESSEE, RESPECTIVELY, ARE—

- I. Express. That is, agreed to, and defined in terms.
- II. Implied [unless expressly excluded by the terms of the tenancy].

I. EXPRESS OBLIGATIONS.

§ Are those defined in terms in the instrument of demise. In leases under seal they are embodied in the *covenants* contained therein.

§ COVENANTS in the same deed may be—

- 1. *Dependent*. That is, when the performance of one is a condition precedent to the performance of the other.

(a) *Farrell v. Davenport*, 8 Jur. N. S. 1043.

For example. Where Jones covenants to keep a house in repair upon Jones, his landlord, putting it in repair.

2. *Independent.* That is, where one party covenants to do one thing, and the other to do another ; and the breach by one party is no answer to an action for a breach by the other.

For example. Where Smith, the lessor, covenants to repair the outside of a house, and Jones, the lessee, covenants to repair the inside ; the covenants are independent ; and it is no excuse in an action by Smith for a breach of Jones's covenant for Jones to aver that Smith had not performed his.

3. *Real.* Such as are annexed to the estate ; or, as it is called, "run with the land."

§ They run with the land, or with the reversion, according as the liability to perform them, or the right to take advantage of them, passes to the assignee of the term or of the reversion.

§ They pass to the assignee of the term, or of the reversion, when they affect the *quality* and *value* of the land, either—

(i) During the term, or

(ii) At the end of the term,

§ THE FOLLOWING COVENANTS RUN WITH THE LAND so as to bind the assignee of the term, or of the reversion.

(i) To pay rent, taxes, or ground rent.

(ii) To repair, or keep in repair.

(iii) To maintain a sea wall.

(iv) To repair tenant's fixtures and machinery fixed to the premises.

(v) Not to plough.

(vi) To use the land in a husbandlike manner.

(vii) To reside on the premises during the term.

(viii) To carry all corn grown on the land to the lessor's mill.

- (ix) To leave the land as well stocked with game as it was at the beginning of the term.
- (x) To supply the demised premises with good water.
- (xi) For quiet enjoyment.
- (xii) For further assurance.
- (xiii) To produce title deeds.
- (xiv) For renewal.
- (xv) To insure.
- (xvi) Not to assign or underlet without leave.
- (xvii) Not to carry on a particular trade.
- (xviii) All implied covenants.

4. *Personal.* Such as are collateral to the thing demised ; do not run with the land ; nor bind the assignees of the term or reversion.

§ These are covenants which do not *touch or concern the land*, but are personal obligations, binding only on the lessor and the lessee.

Illustration. Hayward demised certain premises to be used as a public house, and covenanted not to open another within the distance of half a mile. The lessee assigned the lease to Thomas. Hayward broke his promise, and opened another public house within the prescribed distance. In an action by Thomas, it was held that the covenant did not run with the land, and that he, being an assignee of the lease, could not maintain an action upon such covenant. (a)

§ OF THE LIABILITY OF A LESSEE AND HIS ASSIGNS ON COVENANTS IN THE LEASE.

1. The lessee is liable to the lessor on his covenants, real and personal, although he may have assigned his lease.
2. The *assignee* of the lease is liable to the lessor on the covenants running with the land, so long as he does not assign his lease over.

(a) *Thomas v. Hayward*, L. R. 4 Ex. 311,

- § But should he assign his lease to another his liability on the covenants ceases, and attaches on his assignee.
3. The assignor and the assignee of the lease are liable to each other on any covenants they may have entered into with each other.
 4. If the lessee makes an underlease of the premises, there is no "privity of estate" between the original assignor and the under-lessee; and the under-lessee is not liable to the original lessor in any shape or way; but he is, of course, liable to his immediate lessor (the original lessee) on any covenants he may have made with him.
 5. An underlease of the whole of the lessee's term is in effect an assignment of the term; but there being no privity of estate between the original lessor and the under-lessee, the latter is nevertheless not liable to the original lessor on any covenants in the original lease. (a)

- [NOTE. 1. *Express promises by the lessor* are usually of a very limited character, as it is usual for the landlord to cast all the burthen of repairing, insuring, ratepaying, &c., on the tenant.
2. *Express promises by the lessee* may be made, of course, according to the fancy of the parties, but those commonly inserted in leases (according to the nature of the premises demised) are—
- (i) A covenant to insure.
 - (ii) A covenant not to assign without leave.
 - (iii) A covenant not to carry on any noxious trade on the premises, or not to use the premises for some particular purpose, as for the sale of spirituous liquors or beer.
 - (iv) To pay rent.
 - (v) To pay rates and taxes.
 - (vi) To repair.

(a) *Beardman v. Wilson*, L. R. 4 C. P. 57.

§ COVENANTS TO REPAIR vary in severity according to their terms.

For example—

- (a.) A covenant to keep in repair during the term, means that the premises must be *put into repair and kept so*, at all times during the term.
- (β.) A general covenant to repair, means that the premises are to be kept in *substantial* repair.
- (γ.) A covenant to put premises “into habitable repair,” means that they are to be put into a better state than they were when the tenant found them, and a state reasonably fit for the class of persons who are likely to inhabit them.
- (δ.) Under a covenant “to repair and keep in repair,” if there is no exception as to damage by fire, the tenant is bound to rebuild the premises if they are burnt down, and is bound to pay rent all the time, notwithstanding that the premises are uninhabitable.
- (ε.) In the determining of the sufficiency of repair done under a covenant to repair, the jury are to take into consideration—
 1. The age and character of the building.
 2. Its state at the commencement of the lease.
 3. The length of the lease.
 4. The character of the locality, and the class of inhabitants of the adjacent premises. (b)

[For what would be good repair for St. Giles, would not be good repair for Belgravia.]

(b) *Guttridge v. Munday*, 1 M. & Rob. 336.

- (vii) Special covenants to repair; as, to paint the outside wood and ironwork once in three years, and the inside every seven, to re-paper, re-colour, &c.
- (viii) To surrender the premises at the end of the term in good repair.
- (ix) Provisoes for re-entry on non-payment of rent, and for breach of covenant to repair, &c.
- (x) To repair after notice to repair has been given.
- (xi) For liberty to the lessor, or his agent, to enter and view the state of repair of the premises.]

II. IMPLIED OBLIGATIONS.

I. THOSE OF THE LESSOR.

- (i) That he will give the tenant possession.
- (ii) That he has a good title.
- (iii) That the tenant shall not be disturbed in his enjoyment of the premises.
- (iv) That if the premises consist of *a furnished house*, they are reasonably fit for the purpose for which they are let.

Illustration. Smith let a furnished house at Brighton to Sir John Marrable for six weeks at eight guineas per week. On entering it was found that all the beds but one were so infested with bugs that the family quitted at once, and tendered one week's rent. The Court held that when a man lets a ready furnished house there is an implied condition that it is habitable. (a)

- (v) That the tenant of lands may remove and dispose of the annual produce of the soil or "emblemments," which he has sown during his tenancy, and which has not come to maturity at the end of his tenancy.
- (vi) That, in the absence of express conditions to the contrary,

(a) *Smith v. Marrable*, 11 M. & W. 5; and see *Wilson v. Finch Hatton*, 2 Ex. D. 336.

the "custom of the country" shall be engrafted upon the terms of the tenancy of cultivable land.

[NOTE. *But there is no implied promise by the lessor,*

(a.) That the premises are fit for the purpose for which they are let, if they consist of an *unfurnished house*. (b)

(β.) That the house will last till the end of the term.

(γ.) To do any repairs. (c)

(δ.) To rebuild if the house is destroyed. (d)]

2. THOSE OF THE LESSEE.

(i) That he will use a house in tenantable, and land in a husbandlike manner.

(ii) Not to commit waste, either commissive or permissive. (See *post*, Book III. Part I. Chap. II. A yearly tenant is only liable for commissive waste.)

(iii) To give up the premises at the end of the term. (e)

(iv) To pay rent.

(v) To cultivate land according to the custom of the country.

(vi) A tenant is estopped from alleging that his landlord had no title at the time of the demise. But he may show that such title has expired. (f)

OF THE DETERMINATION OF THE TENANCY.

I. BY NOTICE TO QUIT. This is necessary where the length of the term is not definitely fixed, as in the case of a tenancy from year to year.

§ The notice may be—

1. An agreed notice. .

2. The customary notice.

(b) *Hart v. Windsor*, 12 M. & W. 68.

(c) *Arden v. Pullen*, 10 M. & W. 321.

(d) *Gott v. Gandy*, 2 E. & B. 845.

(e) *Henderson v. Squire*, L. R. 4 Q. B. 170.

(f) *Delaney v. Fox*, 2 C. B. N. S. 768.

3. Where there is neither an agreed nor a customary notice, a reasonable notice.

§ It must be given so as to expire at the end of a current year, half-year, quarter, month, or week, as the case may be, unless there is an agreement to the contrary. (See *ante*, p. 155.)

§ NOTICE TO QUIT UNDER THE AGRICULTURAL HOLDINGS ACT, 1875, is (where there is no agreed notice) increased from six to twelve months.

1. Where the holding is agricultural or pastoral, of two acres or more.

2. Where the parties have not contracted themselves out of the Act. (*a*)

§ THE NOTICE MAY BE WAIVED BY—

1. The lessor accepting, or distraining for fresh rent due after service of the notice.

2. By serving a fresh notice to quit.

II. BY SURRENDER. (See *ante*, p. 38.) This must be—

1. By deed, where the demise is for more than three years. (*b*)

2. In writing, where the demise is for less than three years, and either in writing or by parol. (*c*)

3. By operation of law ; which may arise—

(i) By the substituting a fresh lease for the existing lease.

(ii) By the landlord accepting a fresh tenant in lieu of the original one, under an agreement between all three parties ; *provided* the new tenant actually takes possession.

Illustration. Atherston, who was tenant to Nikells under a demise in writing for three years, quitted the premises, and wrote to his

(a) 38 & 39 Vict. c. 92, ss. 51, 54, 58.

(b) 8 & 9 Vict. c. 109, s. 3 ; 29 Carl. 2, c. 3, s. 3.

(c) 29 Carl. 2, c. 3, s. 3.

landlord, stating his inability to pay the rent, and that he trusted the rooms would be let by the landlord, to someone else on better terms. Nikells accordingly relet the premises to another tenant, who entered, and paid rent. Nikells, however, after finding the latter insolvent, turned round, and sued Atherston for back rent. The Court held that Atherston's term had been surrendered by operation of law. (*d*)

- (iii) By an agreement between the lessor and the lessee that the term shall be put an end to, followed by the formal quitting of the tenant, and entry by the landlord, of the premises.

Illustration. Popplewell was tenant to Phené of certain premises, and on April 12th, 1861, quitted, and left the key at Phené's counting-house. The key was not returned. On 4th May following, Phené entered, and caused the front of the house to be washed down. In June he gave the key to an auctioneer to enable him to show the premises, and a board was put up for letting. Popplewell's name was painted out on September 24th, and on October 26th Phené gave him formal notice that he resumed possession. In an action by Phené for three quarters' rent in arrear, it was held, that the above facts amounted to a surrender by operation of law. (*e*)

[NOTE. Surrender by operation of law is also called surrender by estoppel.

§ **ESTOPPEL IN PAIS** (*estouper, obstipare*) is where

(*d*) *Nikells v. Atherston*, 10 Q. B. 944.

(*e*) *Phené v. Popplewell*, 12 C. B. N. S. 334.

a man is precluded by his own conduct or statements from alleging a state of facts different from that, which he has represented as existing.

For instance. Where the lessee accepts a new lease from the lessor, he affirms, or is estopped from denying, that his lessor had power to grant the new lease; and as the lessor could not grant the new lease, till the old one had been surrendered, the law assumes that on acceptances of such new lease, there has been already a surrender of the old one.]

[*NOTE.* Where a lessee has made an underlease, he cannot by surrendering his term, affect, or prejudice the rights of the underlessee. (a)]

Illustration. Stratton held two pieces of land in the Isle of Wight, B & C, of Sir Richard Simeon under a lease, by which he covenanted that if he built on B & C, the houses on B should have a sea view over C. Stratton gave an under-lease of B to Harbour, and covenanted to observe the covenants in the original lease. Harbour built on B, and assigned his lease to Piggott. Afterwards Stratton surrendered his lease to Simeon, and took from him another without the restrictive covenants, and proceeded to build on C, so as to obstruct the view from B. Piggott applied for an injunction to restrain Stratton from so building; and it was held that the rights of Harbour under Stratton's covenant to observe the covenants in the original lease, were not affected by the surrender of that lease, and that Piggott was entitled to his injunction. (b)]

(a) 8 & 9 Vict. c. 106, s. 9.

(b) *Piggott v. Stratton*, 1 De G. F. & J. 33.

III. MERGER. That is, when there is an union of the term with the immediate reversion ; both being vested in the same person, in the same right.

The term is then said to be merged, or drowned, in the reversion; otherwise the same person would be both landlord and tenant at the same time.

For Instance. If Smith lets premises to Jones for twenty years, and then, subsequently, sells him the fee simple, the lease is merged in the reversion.

IV. FORFEITURE. A lease may be forfeited by the breach of—

1. A condition, or proviso, in the lease ; as a condition that the term shall be determined on the bankruptcy of the tenant.
2. A covenant in the lease.

Provided there is also a condition in the lease for re-entry on the breach of such covenant.

For example. A breach of a bare covenant to repair does not create a forfeiture ; but if there is also a proviso for re-entry in case the covenant to repair should be broken, then a forfeiture ensues on breach of the covenant.

§ A FORFEITURE WILL BE WAIVED, if after breach of the covenant or condition, and with a knowledge of such breach, the lessor does any Act, whereby he acknowledges a continuance of the tenancy at a later period.

For instance. If he accept or distrain for rent which accrues due after the date of the forfeiture.

§ But if ejectment is brought by the lessor for the forfeiture ; it is shown that he has unequivocally elected to determine the lease ; and no subsequent receipt of, or distress for rent will imply a waiver.

Illustration. Moss was tenant of a farm to Grimwood. The latter brought ejectment on July 21st for certain breaches of covenant. Subsequently he distrained for rent due on June 24th. At the hearing of the suit for ejectment, it was contended

that the subsequent distress was a waiver of the breach of covenant; but the Court held that it was perhaps an act of trespass, but was no waiver. (a)

§ FORFEITURE IS RELIEVED AGAINST IN TWO CASES.

1. *For non-payment of rent*, if the tenant within six months of the time that execution has been executed on a judgment in ejectment against him, pays all arrears of rent with full costs. (b)

2. *For breach of covenant to insure where—*

- (i) No loss or damage by fire has occurred.
- (ii) The breach has occurred without fraud or gross negligence.
- (iii) The premises have been duly re-insured at the time of the application for relief.
- (iv) Relief has not already been given to the same person.
- (v) No previous forfeiture has been waived in favour of the same person. (c)

V. **DISCLAIMER.** If a tenant directly repudiates his landlord's title, either—

- 1. By an act *in pais* (that is an overt, notorious act, as by making a feoffment of the land to another by livery of seisin) or
- 2. By denying it upon record (that is, in a Court of law; as, if a tenant were to suffer judgment by default in an action of ejectment brought by a stranger, or plead in an action by a stranger, admitting thereby the stranger's title);

a forfeiture of a *lease for a term of years* is *ipso facto* committed. (d)

§ A **YEARLY TENANCY** may be forfeited by a *parol*

(a) *Grimwood v. Moss*, L. R. 7 C. P. 360.

(b) 15 & 16 Vict. c. 76, ss. 210, 212; 23 & 24 Vict. c. 126, s. 1.

(c) 22 & 23 Vict. c. 35, ss. 4, 6.

(d) *Doe d. Graves v. Wells*, 10 A. & E. 427; Coke, 251b, 252a.

disclaimer [or, to speak more correctly, the denial of the tenancy dispenses with the need of a notice to quit. (e)]

[NOTE. *If a tenant for years wilfully "holds over," after written demand of possession, or after his own notice to quit given to the lessor, the lessor may sue him for double rent. (f)]*

§ A TRUSTEE OF A BANKRUPT'S ESTATE may, in his discretion, by writing, under his hand, disclaim a lease, under which the bankrupt held as lessee, and which has vested in the trustee under the Bankruptcy Act, 1869. (g)

REMEDIES OF THE LESSOR FOR NONPAYMENT OF RENT.

- I. AN ACTION, either on a covenant or a simple contract, as the case may be.
- II. A DISTRESS, which is the taking, without legal process, cattle or goods, as a pledge to compel the satisfaction of the demand.

§ IT IS ESSENTIAL THAT,

1. There should be a tenancy between the parties.
2. That there should be rent due.
3. That the distrainer should have a present right to the reversion.

[NOTE. This is a very ancient remedy, which a landlord is privileged to exercise for the recovery of rent that is in arrear.

He has a right to go upon the premises, and either himself, or by his bailiff, to select, and seize of the goods thereon, such of those, not privileged from distress, (see *post*, Book III. Part III. Chap. II.) as he may consider sufficient to satisfy his claim.

(e) Doe d. *Graves v. Wells*, 10 A. & E. 427 ; Coke 251*b*, 252*a*.

(f) 4 Geo. 2, c. 28, s. 1 ; 11 Geo. 2, c. 19, s. 18.

(g) 32 & 33 Vict. c. 71, s. 23.

He will then "impound" them; if *cattle* are distrained, by taking them to the public pound, or, if there is no public pound, to some safe place; if *goods* are distrained, by collecting them together on the demised premises (a), and "putting a man in possession," (that is, leaving a man on the premises to look after them), or removing them to a place for safe keeping. He will next make an inventory of the goods taken, and serve it with a "notice of distress," [that is, of the fact of the distress; of the amount payable for rent and charges; and of the time within which the goods must be "replevied" (see *post*, "Replevin")] upon the tenant. On the expiration of the time within which the tenant is entitled to replevy (that is five days) he will remove the goods and have them appraised and sold. (b) If there is any balance after the claim for rent, and the costs of the distress, &c., have been satisfied, it will be paid over to the tenant. If the sale does not produce sufficient to satisfy the arrears, a second distress (where cattle is distrained) may be put in; *provided* that there were not sufficient goods on the premises, which could have been taken on the first distress, had the distrainor thought proper. (c)]

§ The landlord may distrain for six year's arrears of rent, and no more. (d)

§ WHEN GOODS HAVE BEEN FRAUDULENTLY REMOVED by the tenant to avoid a distress, the landlord may follow, and distrain them within thirty days of such removal. (e)

Provided the goods have not been sold to a *bonâ fide* purchaser. (e)

[As to when, where, and on what, a distress may be made, see *post*, the chapter on "Wrongful Distress."]

(a) 11 Geo. 2, c. 19, s. 10.

(b) 2 W. & M. c. 5.

(c) 17 Carl. 2. c. 7, s. 4.

(d) 3 & 4 Will. 4, c. 27, s. 42.

(e) 8 Ann. c. 14, s. 2; 11 Geo. 2, c. 19, s. 1.

OF THE RECOVERY OF LAND.

§ If a trespasser comes upon the land of another, he may be ejected by the use of such physical force, as is necessary for the purpose.

§ If, however, a person comes into possession of premises lawfully, and refuses to quit them after the time has expired during which he can lawfully remain there, the real owner with an immediate right of possession cannot expel him by main force; or he will be liable to an indictment for the crime of "forcible entry," and subject to imprisonment during the Queen's pleasure. He must therefore take steps to dispossess the wrongful occupier by a lawful process.

I. BY EJECTMENT AT COMMON LAW, to support which it is

§ ESSENTIAL that the lessor has a right to re-enter—

1. By reason of the expiration of the term,
2. Its determination by a lawful notice to quit, or
3. Its forfeiture.

[NOTE. *If the forfeiture is for non-payment of rent, a formal demand of the rent (unless this is rendered unnecessary by the terms of the lease) must be made—*

- (i) By the landlord, or his agent.
- (ii) On the actual last day remaining to the tenant on which to pay it.
- (iii) At a convenient time before, and at, sunset.
- (iv) At the place specified for the payment of the rent; and if no place is specified, on the demised premises.
- (v) Of the precise sum due, neither more nor less.]

II. BY THE COMMON LAW PROCEDURE ACT, 1852, (f) FOR NON-PAYMENT OF RENT. To support which it is

§ **ESSENTIAL—**

1. That the ejectment be brought by a landlord against his tenant.
2. That the landlord has a right to re-enter for non-payment of rent.
3. That there is at least one half-year's rent due, and in arrear.
4. That there is no sufficient distress to be found on the premises.

[NOTE. No formal demand of the rent need be proved.]

III. BY THE COMMON LAW PROCEDURE ACT, 1852 (a), the lessor may, with his writ of ejectment, serve a notice on the lessee, and call on him to find security for the costs and damages of the action; and in default may sign judgment for recovery of possession and costs.

1. Where there is a lease or agreement in writing,
2. Where the term has either
 - (i) Expired, or
 - (ii) Been determined by a regular notice to quit, and
3. Where the lessee refuses to quit after lawful demand in writing.

IV. BY THE COUNTY COURT ACTS, 1856, SECT. 50 AND SECT. 52 (b), the lessor can get an *order for possession* from a county court against the lessee.

1. For holding over.
 - (i) The term having expired, or
 - (ii) Having been determined by a legal notice to quit.
2. For non-payment of rent.
 - (i) Half a year's rent being in arrear.
 - (ii) There being no sufficient distress to be found on the premises.

(a) 15 & 16 Vict. c. 76, s. 213.

(b) 19 & 20 Vict. c. 108, ss. 50, 52, "The Small Tenements Act."

(iii) The lessor having a right to re-enter.

Provided—

1. Neither the annual value of the premises, nor the rent, exceeds £50.

[And, under sect. 52, provided no fine or premium has been paid for the lease.]

2. No question of TITLE arises. (*c*)

3. The claim is by the landlord against his tenant.

V. BY THE COUNTY COURT ACT, 1867, *ejectment* may be brought in all cases, *notwithstanding a question of TITLE may arise*.

Provided (a.) Neither the annual value, nor the rent payable, exceeds £20. (*d*)

(*β.*) Proceedings cannot be taken under the “Small Tenements Act.” (*e*)

VI. JUSTICES IN PETTY SESSIONS MAY ISSUE A WARRANT TO THE POLICE TO GIVE POSSESSION OF PREMISES TO A LANDLORD.

1. Where there has been a tenancy at will or for a term not exceeding seven years.

2. The term has expired or been lawfully determined.

3. The tenant is holding over.

4. The annual rent payable does not exceed £20; and

5. No fine has been reserved or made payable. (*f*)

§ MESNE PROFITS. Intermediate profits. That is, the profits which have been arising from the land between the time when the right of the plaintiff in *ejectment* first accrued, and the time of his recovery in the action of *ejectment*.

§ A claim for mesne profits may be joined in an action of *ejectment*. (*g*)

(*c*) *Pearson v. Glasebrook*, L. R. 3 Ex. 27; 9 & 10 Vict. c. 95, s. 58.

(*d*) 30 & 31 Vict. c. 142, ss. 11, 12.

(*e*) C. C. Rules, Order XXXVII. r. 25.

(*f*) 1 & 2 Vict. c. 74, s. 1.

(*g*) C. L. P. Act, 1852, s. 214, and Jud. Act, 1875, Order XVII. r. 2.

BOOK III.

RELATING TO PARTICULAR TORTS.

PART I.

OF THE INFRINGEMENT OF THE PRIVATE RIGHTS OF OWNERS AND OCCUPIERS OF LAND.

CHAPTER I.

SERVITUDES:

§ **A SERVITUDE** is a burthen imposed on a man's land for the benefit of adjoining land.

§ **THE SERVIENT TENEMENT** is the name given to the land, on which the burthen is imposed.

§ **THE DOMINANT TENEMENT** to that, in favour of which the servient tenement is burthened.

For instance, if Jones owns No. 1, and Smith owns No. 2, in a street, and the drain of No. 1 has a right to empty itself into the drain of No. 2, the latter being connected with the main sewer in the street; No. 1 is a dominant tenement, and No. 2 is a servient tenement. And No. 1 has the benefit of the servitude with which No. 2 is burthened, by virtue of which the sewage of No. 1 is allowed to pass into the main through the drain pipes of No. 2.

1. **NATURAL SERVITUDES** are those, which are from the nature of the case the necessary adjunct to the properties, to which they are annexed.

1. The burthen of receiving all streams of water, which naturally flow down to them from adjoining land of a higher level.

Illustration. Under an award by enclosure commissioners, a drain was made over two adjoining closes, belonging respectively to Sharpe and to Hancock. Afterwards Sharpe opened a fresh drain into his part of the awarded drain, which consequently carried more water into the lower portion, which it was Hancock's duty to cleanse. In an action by Sharpe against Hancock, for not cleansing the drain, by reason of which the surface water accumulated on Sharpe's land, it was held, that Hancock was bound to provide for the due carrying off of such water as naturally flowed down to his land through the awarded drain; but not for additional water cast upon him by the act of the plaintiff. (a)

2. The burthen of transmitting, unpolluted, all streams of water, flowing upon them, to adjoining land of a lower level.

Subject to the right of making such a reasonable use of the stream during its transit, as does not interfere with the enjoyment of the water by the next riparian owner.

Illustration. Wood & Co., and Waud & Co., were worsted spinners at Bradford; and each had mills on a stream called the Bowling Beck. Wood & Co.'s mills were lower down than Waud & Co.'s. The latter fouled the stream

(a) *Sharpe v. Hancock*, 7 M. & G. 354.

by turning into it soap-lees and wool refuse ; but the water was still sufficiently pure for Wood & Co.'s works. In an action by the latter it was held that they had a right to have transmitted to them the natural stream, in its natural state, free from pollution ; and that they were entitled to maintain the action for the damage in law, though there was no damage from the pollution in fact. (b)

3. The burthen of affording such lateral support to the next adjoining land, as will suffice to keep it in its position, when not weighted by the addition of anything superimposed, such as a building.

Illustration. Mrs. Wyatt and Harrison were owners of adjoining pieces of land, and the former built a house on, and close to, the edge of her own land. Afterwards Harrison dug away the soil on his own ground, in consequence of which the foundations of Mrs. Wyatt's house sank, and the house was greatly injured. In an action by Mrs. Wyatt, the Court held that Harrison's land was bound only to keep the plaintiff's land in its place ; and that she had no right of support to the artificial weight of the house which she had built. (c)

4. The burthen on the owner of the subsoil of affording such vertical support to the surface of the land, as will suffice to keep it in position when not weighted by the addition of anything superimposed, such as a building.

Illustration. Humphries was possessed of certain arable land, under which were certain coal mines,

(b) *Wood v. Wand*, 3 Ex. 748.

(c) *Wyatt v. Harrison*, 3 B. & Ad. 871.

leased by the Durham Coal Company of the Bishop of Durham, the freeholder of the mines. The coal company removed the coal without leaving sufficient support to the surface. In consequence of which Humphries' land sank. In an action by him against the coal company (sued in the name of their secretary) the Court held that they were liable; although they had not been guilty of any negligence in the way in which they had worked their mines. (a)

II. **CONVENTIONAL SERVITUDES** are those which are of greater extent than natural servitudes, and have come into existence by virtue of a contract, express, or implied, between the parties. They are—

1. **EASEMENTS.**

- (i) Rights to pollute the air.
- (ii) Rights to have light unobstructed.
- (iii) Rights of lateral and vertical support *to buildings*.
- (iv) Rights of fouling water.
- (v) Rights to divert, and use, and pen back water.
- (vi) Private rights of way.

[NOTE. § A **public RIGHT OF WAY** is not an easement.

It is a "dedication to the public" by the owner, of the occupation of the surface of the land for the purpose of passing and repassing. (b)

§ **IT IS PROVED** by evidence of an *animus dedicandi* in the owner of the soil, and no user for any particular length of time is required to establish it.]

(a) *Humphries v. Brogden*, 12 Q. B. 739.

(b) *Rangeley v. The Midland Railway Company*, L. R. 3 Ch. 311.

§ AN EASEMENT is a privilege without profit which the owner of land has a right to enjoy in respect of that land over the land of another.

§ *It is essential* that it should be necessary to, and accessory to, the use and enjoyment of land, and is appurtenant thereto.

§ An easement cannot exist "in gross;" for there must be both a dominant and a servient tenement. A contract creating such a right, is a mere personal covenant, and is in other words "a license." (c)

§ An easement is transferable with the land to which it is accessory.

2. PROFITS À PRENDRE.

§ A PROFIT À PRENDRE is the privilege of taking some part of any natural product in the land of another.

(i) THOSE WHICH ARE ATTACHED, AND ACCESSORIAL TO, THE USE AND ENJOYMENT OF LAND.

[NOTE. *Incidents—*

1. There must be a dominant tenement to which they are attached, and for the benefit of which they exist. (c)

2. When assigned along with the dominant tenement, they are still binding on the servient tenement. (c)

(a) *A right of common appendent to land.* This is the right of the freeholders of a manor to depasture on the lord's waste, such horses, oxen, kine, and sheep, as they require for ploughing, and manuring those of their lands which have been in tillage from time immemorial, or have been originally in tillage, and subsequently laid down in grass. (d)

(c) *Ackroyd v. Smith*, 10 C. B. 164

(d) *Bennett v. Reeve*, Willes, 231.

[The right is *presumed to exist* at common law, because in early times nearly all farms were in tillage, and but few in pasture, so that when the crops were in the ground, there would be no place for pasture of the beasts necessarily used in the cultivation of the farm, unless they were turned out on the lord's waste. (a)]

(β.) *A right of common appurtenant to land.* This is a right *founded on grant* to go upon the land of another, and take some natural product therefrom.

1. *Common of pasture* the right of one to depasture on the soil of another, either an agreed number of animals, or so many as can be supported in the winter by the produce of his own land. (b)

2. *Common of estovers*; [*estouffer*, to furnish.] The right of one to take for the use of his tenement, from the woods, or waste lands, of another a portion of his timber, or underwood.

(i) *House bote*, for the repair of the house, and for fuel.

(ii) *Plough bote*, for the repair of instruments of husbandry.

(iii) *Hedge, or hay, bote*, for the repair of fences.

3. *Common of turbary.* The right of one to take for fuel in his house, peat or turf from the wastes of another.

4. *Common of piscary.* The right to take, and carry away, fish from the waters of another.

(a) *Bennett v. Reeve*, Willes, 231, and Co. Litt. 122a.

(b) Co. Litt. 122a.

5. *Common of digging.* The right to go upon the land of another, and dig for, and remove, sand, gravel, clay, minerals, &c., &c.

- (ii) **PROFITS À PRENDRE IN GROSS.** That is, *personal* privileges of coming upon, and taking a profit out of, the land of another.

[NOTE 1. *They are created.*

1. By grant, or reservation.
2. By severance of an appurtenant right to take a *certain fixed* profit, from the land with which it is held.]

[NOTE 2. *Incidents.*

1. The right is not accessorial to the use and enjoyment of any dominant tenement.
2. If assigned, does not bind the servient tenement.

(*Exception.* By the custom of certain manors in the North of England, the customary tenants have rights of sole and separate pasturage, called "cattlegates," and "cowgrasses," which are assignable though held in gross.)

3. Cannot be claimed under the Prescription Act, (See *post* p. 189.)]

(a.) *Common of pasture.*

(β.) *Common of estovers.*

(γ.) *Common of turbary.*

[NOTE. As a rule rights of estovers and turbary are only appurtenant to some house. But where the right granted is to take a *fixed* and *limited* quantity, it may be severed, and becomes a right in gross.]

(δ.) *The right of sporting and fishing;*

(ε.) *The right of digging and removing sand, gravel, clay, minerals, &c., &c.*

CONVENTIONAL SERVITUDES ARE CLAIMED BY VIRTUE OF.

1. AN EXPRESS GRANT. That is, the right to enjoy the privilege must be given to the grantee, or reserved to the grantor, by an instrument under seal.

§ Anything short of this, whether in writing or by parol, is merely a "license," and excuses a trespass but confers no right.

Illustration. Hewlins was tenant of the "Swan Inn" at Chichester, and his landlords, on re-building the inn, agreed with the landlord of one Shippam, who occupied the adjoining premises, that they would pave Shippam's yard if they might be allowed to construct a drain underneath it for the use of "The Swan." The drain was made and the yard paved, and afterwards Shippam stopped up the drain. In an action of trespass by Hewlins against Shippam for so doing, it was held that the right to have the drain under Shippam's yard, not having been given by deed, could not be maintained, and that Shippam had not been guilty of a trespass in stopping it. (a)

[NOTE. A servitude may however be created by devise. (b)]

2. AN IMPLIED GRANT in the following cases.

(i) Where a man has made the enjoyment of one portion of his property *visibly dependent* on another portion, then

(a.) If he parts with the *dominant* tenement, he impliedly grants along with it the easement apparent, as accessorial.

Illustration. In 1787 one McCaa owned a house and garden, and also some adjoining land, on which he made a tanyard, and a drain from the

(a) *Hewlins v. Shippam*, 5 B. & C. 229.

(b) *Phesey v. Vicary*, 16 M. & W. 484.

tanyard into a cesspool in the garden. McCaa sold first the tanyard, and then the garden; and by divers mesne assurances the tanyard became the property of William and John Cochrane, and the house and garden of one Ewart. Ewart stopped up the drain in the garden, and the Cochranes brought their action. The House of Lords held, that an implied grant of the easement passed to the Cochranes. (c)

- (β.) But if he parts with the *servient* tenement, he cannot derogate from his own grant, and so cannot impliedly reserve any easement over it in favour of the dominant tenement remaining in his possession.

Illustration. Knox from 1841 to 1845 owned a dry dock, and a coal wharf adjoining; during which time the bowsprits of vessels, repairing in the dock, used to project some fourteen feet over the wharf. In 1845 Knox sold the wharf to Brown, without any express reservation. In 1846 he let the dock to Mills for 21 years; and in 1861, sold it, subject to the lease, to Suffield. During all this time, also, the bowsprits used to project as before. In 1861 Brown proceeded to build warehouses on the wharf; and Suffield prayed for an injunction against him to restrain him from so building, as to interfere with the bowsprits. The injunction was refused. (d)

- (ii) Where a man grants land, to which there is no access, except over his own land, he impliedly grants also “a way of necessity” over his own land, which will continue so long as the necessity lasts.

Illustration. Davies was assignee of a building agree-

(c) *Ewart v. Cochrane*, 4 Macq. 117.

(d) *Suffield v. Brown*, 33 L. J. Ch. 258.

ment with Eton College, by which it was agreed that the builder should erect on some land at Hampstead, belonging to the college, two rows of houses back to back, between which should be certain mews approachable only through an archway in one of the rows of houses; and on the completion of each house the college should grant a lease of the land and house to the builder. When the builder had completed the house, under which was the archway, wherethrough the mews were to be approached, the college granted him a lease, which he assigned to Sear. No reservation of a right of way under the archway was mentioned. When the buildings were all completed, and the mews consequently surrounded, Sear stopped up the archway. And on Davies removing the obstruction, brought an action of trespass against him. Davies applied for an injunction to restrain Sear from stopping up the archway, and it was held, that there was an implied reservation in the lease to Sear of a right of way, being a way of necessity, under the archway to the mews. (a)

- (iii) Where a man sells land *for building* he impliedly also grants a right of lateral, and (if he reserves the minerals) of vertical, support from his own land, sufficient to sustain the grantee's buildings.

Illustration. The Leeds and Selby Railway Company bought of one Hall, the right to make a tunnel through a certain portion of Hall's land; the right to dig for minerals in the land, through which the tunnel was to go, being reserved to Hall. Hall sold his land to Crossland; who proceeded to work the minerals: but, on its appearing that such working would be dangerous to the tunnel, the North Eastern Railway

(a) *Davies v. Sear*, L. R. 7 Eq. 427.

Company, who had purchased the Leeds and Selby line, obtained an injunction against Crossland, restraining him from digging for minerals; as it was not competent for the vendor so to use his land, as to destroy the object for which alone the sale of the land was made. (b)

- (iv) Where a man has built houses alongside of each other, or one upon another, so that each house requires, and receives, the support of the house next to, or below, it; and parts with the possession of each of the houses to different persons; each adjoining, or each super-imposed house, has an implied right of support from the next adjoining, or subjacent, house.

Illustration. Halliday sold two houses, Nos. 5 & 6, in the same street, the one to Richards, and the other to Rose. Rose in executing some necessary work to the drains of her house caused a settlement in the wall of Richards' house. In an action by Richards it was held, that where houses were so erected, as to require mutual support, there is by implied grant or reservation, a right in each house to such mutual support. (c)

3. A LOST GRANT. That is to say, when the use has been enjoyed "from time immemorial," the law presumes that a grant has been made at some remote period, of which all trace has disappeared.

§ *In order to support a claim to a lost grant it is essential, that*

- (i) The enjoyment should have been exercised *notoriously*.

Illustration. Solomon owned Nos. 2 & 3, Pilgrim Street, Ludgate Hill. No. 1 belonged to Sir John Prior: next to No. 1, came a corner house,

(b) *North-Eastern Railway Company v. Crossland*, 32 L. J. Ch. 358.

(c) *Richards v. Rose*, 9 Ex. 221.

No. 13, Broadway, belonging to the Vintners' Company. Pilgrim Street sloped towards the junction with Broadway ; and for 30 years Nos. 1, 2 & 3 had been out of the perpendicular ; No. 3 appearing to lean on No. 2 ; No. 2 on No. 1 ; and No. 1 on No. 13, Broadway. The Vintners' Company pulled down No. 13, Broadway, the result of which was, that Sir John Prior's house fell ; and also the two houses of Solomon. In an action by Solomon against the Vintners' Company it was held, that no grant could be presumed in favour of the Plaintiff's houses ; for a claim as of right must not be acquired *by stealth* ; and here, though a guess might have been made, there could have been no certain knowledge by the Defendants, that the Plaintiff's house was being supported by them. (a)

(ii) Adversely, *as a matter of right*.

Illustration. Tickle claimed a right of way over certain land of Brown, and sent his servants across the land with a horse. Brown forcibly prevented the passage of the servant. In an action brought by Tickle for the trespass, and alleging a right of way, the defendant sought to give evidence at the trial that the land was from time to time under tillage, and that permission was from time to time given to parties desirous to cross Brown's land, in order to show that the user of the land was not "of right," but under leave given. It was held by the court that such evidence was clearly admissible to show the absence of the right. (b)

(a) *Solomon v. The Vintners' Company*, 28 L. J. Ex. 370.

(b) *Tickle v. Brown*, 4 A. & E. 369.

- (iii) Exercised with the *knowledge of the owner* of the servient tenement.

Illustration. Daniel occupied a house in Stockport, and threw out windows therein in 1787, overlooking a low adjoining building, in the occupation of one Ashgrove as tenant to Sir G. Warrender. After the lapse of more than twenty years, North, Ashgrove's successor, raised this low building so as to block Daniels' windows. In an action by Daniels for the obstruction to his lights, no evidence was given at the trial that Daniels had enjoyed the access of the light during the twenty years *with the knowledge of the reversioner*, Sir G. Warrender, and the court held that in the absence of such evidence there could be no presumption of a grant of the light against the party capable of making the grant. (c)

[As to the acquisition of the right to the enjoyment of light under the Prescription Act, see *post*, p. 190.]

- (iv) The enjoyment should have been *continuous*.

Illustration. Onley owned two closes, the "Click Head Meadow," and the "Rock Hill Colts." Gardiner owned an adjoining close called the "Click Head Coppice." He claimed a right of way, for twenty years, from his own close, over Onley's two closes, to the high road. It was proved at the trial, that the "Click Head Coppice" had, about forty years before action, been a hopyard; and that the hops and hoppers used to be carried, from time to time, from the yard to the high road, across the two closes. It was also proved that at a time, some fifteen years before

(c) *Daniel v. North*, 11 East, 372.

action, all the three closes had been in possession of the same owner. The court accordingly held, that as during the time of unity of possession there was no person who could complain of the user of the right of way, there was no *continuous* adverse user, as of right; and that no grant could therefore be presumed. (a)

- (v) Uninterrupted. [Interruptions are usually either of a physical character, as the erection or closing of a gate; or a prohibition of the user, acquiesced in. For such an interruption as will defeat a claim to a right of way under the Prescription Act, see *post*, p. 193.]

- (vi) The user must have been *capable* of interruption.

Illustration. Webb owned a windmill, and Bird built a school-house and premises on the west side of the mill, which obstructed the currents of air blowing from the west towards Webb's mill. He sued Bird for obstructing these currents of air, to which he claimed a right of user for twenty years. The court held, that no such claim could be supported as it was impossible for the adjoining owner, over whose land the right to have the passage of the air was claimed, to use any means of interruption, whereby he could prevent Webb from acquiring a right by user. (b)

- (vii) The enjoyment has been "from time immemorial."

[NOTE. This is professedly a period extending from the beginning of the reign of Richard I. A.D. 1189. But in practice the judges have directed juries to *presume* "immemorial usage," if the user is shewn to have existed for *twenty* years before action.]

(a) *Onley v. Gardiner*, 4 M. & W. 496.

(b) *Webb v. Bird*, 10 C. B. N. S. 268.

§ *Evidence rebutting the presumption of a grant can be given* by shewing that no grant could ever have been made.

Illustration. Barker had a house at Norwich, the windows of which had for more than twenty years overlooked some glebe land belonging to the rectory of St. Edmund. Six years before action the rector had, with the consent of the bishop, conveyed the land to Richardson, who built on the land, and obstructed Barker's windows. It was held that the enjoyment for twenty years could not in this case give a right to the user of the light, as there was no one during the time capable of making a grant, the rector for the time being, being only a tenant for life, and so no grant could be presumed. (c)

4. THE PRESCRIPTION ACT, 1832, (d) which was passed in order to give the sanction of the legislature to the practice of the judges mentioned above (p. 188 (vii) note).

§ *The effect of the Prescription Act is—*

(i) That "time immemorial" is cut down.

(a.) In the cases of profits *à prendre*, appurtenant and appendent;

To thirty years. (e)

(β.) In the cases of rights of way, and watercourse, and of easements, *ejusdem generis*. (f)

To twenty years. (g)

(ii) An absolute right is given, on proof of actual enjoyment, (unless a license, in writing, for the user is shewn.)

(c) *Barker v. Richardson*, 4 B. & Ald. 579.

(d) 2 & 3 Will. 4, c. 71.

(e) *Ibid.* s. 1 and preamble.

(f) See *Webb v. Bird*, 10 C. B. N. S. 268 ; 13 C. B. N. S. 841.

(g) 2 & 3 Will. 4, c. 71, preamble, and s. 2.

- (α.) In the case of profits *à prendre*, appurtenant and appendent ;
For sixty years. (a)
- (β.) In the case of rights of way, and watercourse, and of easements, *ejusdem generis*, (except the use of light) ;
For forty years. (b)
- (γ.) In the case of the use of light ;
For twenty years. (c)
- (iii) The Prescription Act applies only when the claim is made, (d)
- (α.) By custom.
- (β.) By prescription.
- (γ.) By grant.
- (δ.) As accessorial to the use and enjoyment of land.

[NOTE. Subject to the above, all the essentials to a claim by prescription *at common law* (that is by virtue of a lost grant) must exist, for the support of a claim under the Prescription Act (see *ante*, p. 185), with the exception of a claim to the user of light, which need not be made “as of right.” (e)]

5. By CUSTOM. The privilege of going upon the land of another under a custom must be claimed, not through any individual right, but as a member of a *particular class* of persons.

§ THE CUSTOM MUST BE— •

- (i) Certain.
- (ii) Reasonable.
- (iii) Claimed as of right.

(a) 2 & 3 Will. 4, c. 71, s. 1.

(b) *Ibid.* s. 2.

(c) *Ibid.* s. 3.

(d) 2 & 3 Will. 4, c. 71.

(e) *Trusecott v. The Merchant Taylors' Company*, 11 Ex. 855.

- (iv) From time immemorial.
- (v) By a particular class of persons.

Illustration. Tyson occupied certain waste land of the Manor of Westward, in Cumberland; on which, twice in the year, was held a fair. At the time of the fair Smith, a victualler, claimed by virtue of an ancient custom in favour of victuallers, to erect a booth, stall, and other things on Tyson's land, paying 2*d.* to the lord. Tyson brought an action of trespass against him; and Smith pleaded the custom as a defence. The court held it a good custom. (*f*)

[*NOTE.* *A profit á prendre* lies only in grant; and cannot be claimed by custom, in favour of a particular class of persons, as the right cannot vest in a fluctuating body.

Unless the right is claimed by virtue of a grant *from the Crown*. In which case the law will presume that the Crown formed the particular class into a corporation, for the purpose of receiving the grant.

Illustration. A grant from the Crown by charter (which was lost, but of the original existence of which it was alleged on the argument there was evidence,) to the inhabitants of Loughton in Essex, a Crown manor, that the poor people inhabiting the parish, and having families, might, during a certain period every year, cut or lop the boughs and branches, above seven feet from the ground, on the trees growing on the waste lands of the manor and parish of Loughton, for their own use and consump-

(*f*) *Tyson v. Smith*, 6 Ad. & E. 745.

tion, and for sale, for their own relief, to all or any of the inhabitants for their consumption within the parish as fuel, was held to be valid. (a)

§ EXCEPTIONS—

- (i) *Rights of common*, claimed by the copyhold or customary tenants of a manor over the lord's demesne, on the condition of rendering certain services.
- (ii) *Stannary rights in Cornwall* by which tin-bounders are entitled to dig for tin on the lord's waste, on payment of a small royalty.]

CONVENTIONAL SERVITUDES ARE EXTINGUISHED.

1. By unity of ownership, the lesser right being merged in the greater. (b)
2. By release under seal.
3. By an act of notorious abandonment.

Illustration. Moore had a house, yard, and garden at Ripley in Derbyshire. At the end of the garden and abutting on land of Rawson, there had formerly been a weaver's shop with an ancient window overlooking Rawson's land; and seventeen years before action Moore had pulled this building down, and built a stable on the site of it, with a blank wall where the ancient window used to be. Three years before action Rawson erected a building, next to this blank wall; and Moore then opened a window in the blank wall, where the ancient window used to be; and sued Rawson for obstructing his ancient light. It was held that Moore had by his conduct evinced an intention of

(a) *Willingale v. Maitland*, L. R. 3 Eq. 103.

(b) *Surey v. Piggot*, Palmer 444.

not resuming the right, which he had ceased to enjoy ;
and that he must be taken to have abandoned it. (c)

4. By forfeiture, if the right is held conditionally, and the condition is broken.

Illustration. Cawkwell had an undisputed right to pour his surface water into Russell's drain. He chose also to conduct into it the foul water from his privies. Russell upon this cut off the connection with his drain altogether. In an action by Cawkwell it was held that the defendant was entitled to prevent the plaintiff from using the drain at all, so long as he continued to pour foul water into it. (d)

5. By an interruption (e) where the claim is grounded on enjoyment under the Prescription Act. (f)

- (i) For one year ;
- (ii) Acquiesced in or submitted to ;
- (iii) After notice.

[NOTE. In order to rebut evidence of submission, it is enough to show that the party interrupted has in a reasonable manner communicated to the party causing the interruption that he does not really submit to, or acquiesce in, it. (g)]

(c) *Moore v. Rawson*, 3 B. & C. 332.

(d) *Cawkwell v. Russell*, 26 L. J. Ex. 34.

(e) [NOTE. Strictly speaking, an "interruption" of the above character is only an answer to a claim under the Prescription Act. But substantially a *bond fide* right claimable under the Prescription Act which has been thus "interrupted" becomes absolutely extinguished.]

(f) 2 & 3 Will. 4, c. 71, s. 4.

(g) *Glover v. Coleman*, L. R. 10 C. P. 108.

CHAPTER II.

WASTE.

§ **WASTE** (*vastum*) is lasting damage done to corporeal hereditaments to the injury of the remainderman or the reversioner.

1. *Commissive waste* is the doing of active, wilful, damage to the premises, as by pulling down a house, opening hitherto unbroken ground for clay, gravel, minerals, and the like.
2. *Permissive waste* is where premises are allowed to fall out of repair without any effort being made to retard their deterioration.

§ **PERSONS LIABLE FOR WASTE (BOTH COMMISSIVE AND PERMISSIVE.)**

- (i) Tenant by the courtesy. (*a*)
- (ii) Tenant in dower. (*a*)
- (iii) Guardians. (*a*)
- (iv) Tenant for life. (*b*)
- (v) Tenant *pur autre vie*. (*b*)
- (vi) Tenant for years. (*b*)
- (vii) Assignee of tenant for life or years. (*c*)

[NOTE. The reason tenants for life, *autre vie*, and years were not liable for waste at common law, was that their interest is created by their grantor, who, if he had chosen, could have protected the reversion by the terms of the grant,

(*a*) By the Common Law.

(*b*) By the Statute of Marlbridge, 6 Ed. 1, c. 5.

(*c*) Cro. Eliz. 683.

and the common law only gave a remedy where the estate was conferred on the tenant by the act of the law itself.]

3. *Equitable waste.* Where the grant is made "without impeachment for waste;" that is, where the grantor has in terms excepted the tenant from the statutory liability, the court will still restrain the tenant from doing acts of wanton and malicious waste to the premises.

Illustration. Lord Barnard, tenant for life of a settled estate *sans waste*, having quarrelled with his eldest son, got 200 workmen together, and of a sudden, in a few days, stripped Raby Castle of the lead, iron, glass-doors, and boards, &c., &c., to the value of £3,000. The court, upon the filing of a bill by the son, granted an injunction. (*d*)

§ **FIXTURES.** If a tenant for life, or for years, removes fixtures to which he has no right, an act of waste is committed.

I. LANDLORD'S FIXTURES.

1. Those upon the premises at the time of the demise.
2. Those erected by the landlord during the demise.
3. Those so erected by the tenant during the demise, as to become part of the freehold.

II. TENANT'S FIXTURES.

1. Those which have been erected by the tenant.
 - (i) For purposes of trade.

Examples—

- (a.) "Mules" screwed into the floor. (*e*)
- (β.) Barns, granaries, sheds, mills, resting on pattens, plates, brickwork, but not let into and united with the soil. (*f*)
- (γ.) Vats resting on brickwork and timber. (*g*)

(*d*) *Lord Vane v. Lord Barnard*, 2 Vern. 739.

(*e*) *Hellawell v. Eastwood*, 6 Ex. 312.

(*f*) *Huntley v. Russell*, 13 Q. B. 572.

(*g*) *Horn v. Baker*, 9 East 215.

- (*δ.*) Iron salt pans, let into a brick floor, with furnaces under them. (*a*)
- (*ε.*) A steam engine for working a colliery. (*b*)
- (*ζ.*) Brewing vessels, and the pipes in the walls connected therewith. (*b*)
- (ii) For ornament or convenience.

Examples—

- (*α.*) Hangings and pier glasses. (*c*)
 - (*β.*) Cornices. (*d*)
 - (*γ.*) Ornamental chimney pieces. (*e*)
 - (*δ.*) Wainscot fixed to the wall by *screws*. (*f*)
 - (*ε.*) Grates, ranges, and stoves. (*f*)
 - (*ζ.*) Pumps. (*g*)
 - (*η.*) Bookcases and cupboards screwed to the walls. (*h*)
 - (*θ.*) Furnaces and coppers. (*i*)
2. Farm buildings, engines, and machinery, which have been erected by the tenant.
- (i) For agricultural purposes.
 - (ii) For purposes of trade *and* agriculture.
 - (iii) After notice in writing to the landlord.

Provided—

- (*α.*) The severance does not materially injure the freehold.
- (*β.*) A month's notice to elect to purchase is given to the landlord. (*k*)

- (*a*) *Lawton v. Salmon*, 3 Atk. 15 n.
- (*b*) *Lawton v. Lawton*, 3 Atk. 3.
- (*c*) *Beck v. Rebow*, 1 Ps. Williams, 94.
- (*d*) *Avery v. Cheslyn*, 3 A. & E. 75.
- (*e*) *Bishop v. Elliot*, 11 Ex. 115.
- (*f*) *Lee v. Risdon*, 7 Taunt. 191.
- (*g*) *Grymes v. Boweren*, 6 Bing. 437.
- (*h*) *Birch v. Dawson*, 2 A. & E. 37.
- (*i*) *Squier v. Mayer*, 2 Freem. 249.
- (*k*) 14 & 15 Vict. c. 35, s. 3.

3. Engines, machinery, and other fixtures, affixed by a tenant to his holding, erected under a tenancy *to which the Agricultural Holdings Act, 1875, applies.* (l)

Provided—

- (i) All obligations to the lessor have been performed by the tenant;
- (ii) No avoidable damage is done;
- (iii) All damage occasioned by the removal is made good;
- (iv) One month's notice in writing is given to the lessor, to elect to purchase the fixtures;
- (v) That, in the case of a steam engine, prior to its erection,
 - (a.) The tenant had given notice in writing to his lessor, of his intention to erect it;
 - (β.) The lessor had not objected to its erection by a notice in writing. (l)

§ THE RIGHT OF REMOVAL is a question, which arises between

- 1. The heir and the executor of the tenant for life;
- 2. The remainderman and the executor of the tenant for life;
- 3. Landlord and tenant.

[NOTE. § The general rule is, that whatever has once been affixed to the freehold cannot be severed therefrom.

§ This rule has, from time to time, been relaxed; especially between landlord and tenant.

§ The law shows a less degree of favour to the freeholder in the 3rd class, than in the 2nd; and in the 2nd than in the 1st.

§ The relaxation has been made, principally, in favour of articles erected by the tenant for trade

purposes : and has been extended to articles of ornament, which can be severed without materially injuring the freehold.]

§ THE RIGHT OF REMOVAL EXISTS ONLY DURING THE CONTINUANCE OF THE TERM, AND UNTIL THE TENANT GIVES UP POSSESSION; upon which a presumption of law arises that they are a gift in law to the reversioner. (a)

(a) *Penton v. Robart*, 2 East 88.

CHAPTER III.

TRESPASS TO LAND.

§ A TRESPASS TO LAND is committed, where one enters upon land in the occupation, or possession, of another without lawful excuse.

§ AN ENTRY will have been made, and a trespass committed,

1. If a man walk upon the land.
2. If he throws stones, rubbish, &c., upon it.
3. If he allow water, filth, &c., to be discharged thereon.
4. If he suffers his cattle, poultry, or domestic animals, to go thereon.

§ LAWFUL EXCUSES.

1. Where the entry is made with the leave of the occupier.

[NOTE. *Where the license or other lawful excuse is departed from, a trespass will have been committed ab initio. (b)*

Illustration. Watts was bailiff to Lord Dartmouth (Lord of the manor of A.), and impounded a horse, which was an estray. After impounding the horse, he worked it, which was, admittedly, an unlawful act. It was held that he was a trespasser *ab initio. (c)*

2. Where made upon unenclosed land adjoining a highway, in order to drive off cattle, freshly straying thereon. (d)

(b) See the Six Carpenters' Case, 1 Sm. L. C. 7th ed. vol. 1, p. 133.

(c) *Oxley v. Watt*, 1 T. R. 12.

(d) *Goodwin v. Cheveley*, 4 H. & N. 631.

3. Where made to recover chattels, improperly removed thither, by the owner of the land. (a)
4. Where made in order,
 - (i) To escape pressing danger. (b)
 - (ii) To prevent a murder. (c)
 - (iii) To make an arrest for felony. (d)
5. To abate a nuisance, after previous notice, and request that it be abated.

Illustration. Davies encroached on a common in Cardiganshire, called Mynydd Pencarreg, by erecting a house, and making an enclosure upon it. Williams who had rights of common over this waste, gave him notice to remove it; and on his refusing to do so, pulled it down. It was held that he was entitled to act as he had done. (e)

6. Where made in the exercise of a right, as in the user of an easement.

§ FOR DAMAGE DONE BY RIOTERS to buildings and machinery, the inhabitants of the hundred are liable. (f)

- (i) Where it exceeds £30, the claim is made by action.
- (ii) Where it is under £30, the claim is made before justices.

§ REMEDY WHERE ANIMALS OR CHATTELS ARE TRESPASSING
“ DAMAGE FEASANT.”

The occupier of the land may seize and impound until fair compensation be tendered or paid, all animals and chattels

1. Unlawfully upon his land; and

(a) 2 Roll. Abr. 565, pl. 9.

(b) 37 Hen. 6, 37, pl. 26.

(c) 2 B. & P. 260.

(d) *Smith v. Shirley*, 3 C. B. 142.

(e) *Davies v. Williams*, 16 Q. B. 556.

(f) 7 & 8 Geo. 4, c. 31, ss. 2, 8.

2. Doing damage to his land at the time of seizure.

Provided they are not, at the time, under the immediate personal control of their owner, or his servants.

Illustration. Field drove a cart and horses across the land of Adames. Whereupon Adames and his servants distrained the horses, cart, and harness, damage feasant, in spite of resistance on the part of Field. Field sued them for the assault, which the defendants justified as being necessary to the exercise of Adames' right of distraint. But the court held that as the chattels in question were at the time under Field's personal care, Adames had no right to seize and impound them. (*g*)

§ *Duties of the distrainor.*

1. He may not sell the distraint (except as hereafter mentioned).
2. He must, at his peril, provide a proper pound.
3. He must, under a penalty of £20, provide impounded animals with sufficient food and water. (*h*)
4. He may sell the distress in open market, to meet the expenses of providing the food and water and sale, rendering the balance to the owner of the animal.

After (i) Seven clear days have elapsed.

(ii) Three days public, printed, notice has been given. (*i*)

(*g*) *Field v. Adames*, 12 Ad. & E. 649.

(*h*) 12 & 13 Vict. c. 92, s. 5.

(*i*) 17 & 18 Vict. c. 60, s. 1.

PART II.

OF BREACHES OF DUTY BY THE OWNERS AND OCCUPIERS
OF LAND.

CHAPTER I.

NUISANCES.

§ A NUISANCE (*nuire*, to hurt) is a thing maintained upon the land of one, which causes injury or annoyance to the person or property of another.

1. *The occupier* is *primâ facie* liable.
2. *The owner* is also liable if,
 - (i) He buys the reversion of, or
 - (ii) Demises, premises with an existing nuisance thereon.

§ There is nothing unlawful in a man keeping a dangerous thing on his premises, but the moment it does injury to another, it becomes a nuisance; although the owner has been guilty of no negligence in the keeping of it.

Illustration. Fletcher was the owner of certain coal mines, called the Red House Colliery, which he worked until he reached certain disused shafts reaching vertically to the surface of the soil. These shafts had been filled up with rubble and marl. Rylands, who occupied the surface, constructed a reservoir thereon, in the site of which the upper ends of these vertical shafts were met with. There was no charge of negligence in the construction of the reservoir. When the reservoir was filled, the water

burst through these old shafts, and flooded Fletcher's mine. In an action by the latter, it was held that Ryland's was liable, as he had collected a dangerous thing upon his premises, and was bound at his peril to keep it from becoming injurious. (a)

[NOTE. A nuisance may of course be caused by negligence, but it may exist without negligence.]

§ *The extent of the "annoyance,"* to be actionable, must amount to the materially interfering with the ordinary physical comfort of human existence, reference being had to the character of the neighbourhood. (b)

For instance. Annoyance from smoke in the open country might amount to a nuisance; while the same thing at Shields, where the quantity of smoke in the atmosphere would at all times be considerable, might be none at all. (c)

§ EXAMPLES OF NUISANCES.

I. Resulting from Acts of Commission.

1. The carrying on an offensive, noisome, or noisy trade.

Illustration. Selfe, a brickmaker, occupied a strip of land on Surbiton Hill, where he burnt bricks in clamps. The vapours and smells arising therefrom came upon the garden and pleasure ground of Walter, (which adjoined Selfe's land,) and polluted the air. Walter applied for an injunction to restrain Selfe from committing this nuisance, and the injunction was granted. (d)

2. The collecting of a crowd to the annoyance of a neighbourhood.

Illustration. Brewster, the proprietor of a music

(a) *Fletcher v. Rylands*, L. R. 3 H. L. 330.

(b) *Walter v. Selfe*, 4 De G. & Sm. 323.

(c) Cf. Lord Cranworth, *St. Helen's Smelting Company v. Tipping*, 11 H. L. C. 653.

(d) *Walter v. Selfe*, 4 De G. & Sm. 323.

hall, hired a house and grounds near Wolverhampton, called Waterloo House, for two years : and held there “a monster fête” every Monday and Friday, with music, dancing, and fireworks, which brought together a great crowd of noisy and disorderly people. On a bill being filed by owner of an adjoining house, an injunction, restraining the nuisance, was granted. (a)

3. The making of great and unjustifiable noises in the night-time.

Illustration. Smith was convicted on an indictment, and fined £5 for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood. (b)

4. The obstructing of a thoroughfare.

Illustration. James set up an open gate, upon hinges, across a highway. Hayward, one of the public, who was obstructed by it, broke it down. James sued him in trespass for damaging the gate. It was held that the gate was a common nuisance, and Hayward was justified in removing the obstruction. (c)

II. Resulting from Acts of Omission.

1. The stoppage of drains and watercourses, through failure to clean out and repair them.
2. The keeping of a dangerous place unfenced upon premises on which persons are invited to come on lawful business.

Illustration. Indermaur, a journeyman gas-fitter, was sent by his employer to work upon a contract with Dames, a sugar refiner, upon Dames' premises. On the first floor was a hole, or shoot,

(a) *Walker v. Brewster*, L. R. 5 Eq. 25.

(b) *Rex v. Smith*, 1 Str. 704.

(c) *James v. Hayward*, Cro. Car. 184.

used for lowering goods. It was unfenced, and Indermaur, crossing the floor, in ignorance of the danger, fell through the hole and fractured his spine. In an action against Dames, it was held that there was an obligation to fence the hole for the protection of strangers coming on the premises upon lawful business. (d)

[**Note.** This obligation subsists in favour of strangers coming upon *lawful business*, but does not extend to a *bare licensee*.

Illustration. Southcote went to stay at Stanley's hotel *as a visitor*, and, in leaving the hotel, had to pass through a glass door. A large piece of glass in the door was loose, and fell upon, and injured him. In an action by Southcote, it was held, that a visitor in a house was in the same position as a servant, or other member of the household; and that there was no obligation upon Stanley to guard him from the consequences of a mere act of omission. (e)]

3. The suffering to escape any dangerous thing, or animal, which has been lawfully brought on the premises.

(i) Creatures naturally mischievous, like a rattlesnake, are kept by the owner at his peril.

(ii) Creatures not naturally mischievous, like dogs and horses, are not kept at the owner's peril,

Unless he has *notice* that they are of a mischievous disposition. (f)

(d) *Indermaur v. Dames*, L. R. 1 C. P. 274.

(e) *Southcote v. Stanley*, 1 H. & N. 247.

(f) *May v. Bardett*, 9 Q. B. 110,

§ A NUISANCE MAY BE—

I. Public.

§ REMEDIES—

- (i) Injunction.
- (ii) Indictment.

§ CHARACTERISTICS—

- (i) It cannot become lawful by user for any length of time. (*a*)
- (ii) It cannot be abated by, and
- (iii) Is not actionable at the suit of a private individual.

Unless he has suffered some particular damage beyond what is common to others.

For instance. If Jones digs a hole in a public thoroughfare, he may be indicted for the nuisance; but an action will not lie against him. But if Smith falls into the hole, and breaks his leg, Smith will at once be able to maintain an action against him.

II. Private.

§ REMEDIES—

- (i) Injunction.
- (ii) Action.

§ CHARACTERISTICS—

- (i) It becomes lawful after exercise for twenty years without interruption. (*b*)
- (ii) It is actionable at the suit of the party injured.
- (iii) It may be abated by the party injured *after notice* and *request* to abate the nuisance given to the wrong-doer.

§ It is no answer to an action for a nuisance, to say—

1. That the nuisance was maintained in a suitable and convenient place.

(*a*) *R. v. Cross*, 3 Camp. 227.

(*b*) *Elliotson v. Feetham*, 2 Bing. N. C. 134.

Illustration. Turnley, who had purchased some building land at Norwood, proceeded to burn bricks thereon; the smoke and smell of which caused great annoyance to his adjoining neighbour, Bamford. In an action by the latter, Turnley raised as a defence, that the nuisance was committed on a proper and convenient spot; but the court held that this was no answer. (c)

2. That it is for the benefit of the public.

Illustration. Potter had some cotton-printing works on the Glossop brook. From lower down the stream at "Nag's pool," the Stockport Waterworks Company drew their water for the supply of Stockport. They complained that Potter's works defiled the stream, and in an action by them, Potter, amongst other defences, pleaded, that his trade was carried on for purposes necessary and useful to the community. It was held to be no defence. (d)

3. That the party injured has come to the nuisance.

Illustration. Sir Henry De Hoghton had an estate near St. Helen's. In 1859 he sold a portion to the St. Helen's Smelting Company, who there erected copper works. In 1860 he sold another portion, called Bold Hall, to Tipping. It was not denied that, before purchasing, Tipping had notice of the existence of the copper works. Shortly afterwards Tipping applied for an injunction against the company, having already recovered substantial damage in an action at law, for injury done to his land by the smoke from the works. The Defendants contended that the Plaintiff, having come to the nuisance, was not entitled to relief in equity. But the court granted the injunction. (e)

(c) *Bamford v. Turnley*, 31 L. J. Q. B. 286.

(d) *Stockport Waterworks Company v. Potter*, 31 L. J. Ex. 9.

(e) *Tipping v. St. Helen's Smelting Company*, L. R. 1 Ch. 66.

CHAPTER II.

OF THE NEGLIGENT USE OF REAL PROPERTY.

§ Where one man by want of proper care in the management of his land, or the buildings thereon, causes injury to the person or property (real or personal) of another, he is liable in damages to that other.

For example—

1. Where he overloads the floor of a warehouse, so that the floor falls on, and damages the goods of another, which are in the room beneath. (*a*)
2. Where he makes an excavation in his land without due care, which causes a building on adjoining land to fall. (*b*)
3. Where a railway company leave open their gates on a level crossing, through which cattle stray on to the line, and are injured. (*c*)

Unless the party injured was himself negligent, and by his own conduct contributed towards the happening of the mischief [see *post*, Part IV. Chap. I.]

§ FIRE. At common law every person who lights a fire on his own premises, is responsible for its safe keeping.

Unless. 1. The fire is spread by the act of God.

2. The fire begins *accidentally*. (*d*)

(*a*) *Edwards v. Halinder*, Poph. 46.

(*b*) *Trower v. Chadwick*, 3 Sc. 722.

(*c*) *Fawcett v. Midland Railway Company*, 16 Q. B. 618.

(*d*) 12 Geo. 3, c. 73, s. 37 ; 14 Geo. 3, c. 78, s. 86.

[NOTE. *Accidentally* means—

(i) Originating through mere chance, and without negligence ; or

(ii) The cause of which cannot be traced. (e)]

[As to the spreading of fires from locomotive engines, &c., see *post*, Part VII.]

(e) *Pilliter v. Phippard*, 11 Q. B. 357.

PART III.

OF THE INFRINGEMENT OF THE RIGHTS OF OWNERS OF
CHATTELS.

CHAPTER I.

TRESPASS AND CONVERSION.

I. TRESPASS TO CHATTELS is the wrongful intermeddling with the goods of another, to which that other has a present right of possession.

Illustration. Upon the Custom House Quay there was a hut, in which certain porters each had a box, where they could deposit parcels, until a ship was ready to receive them. Bushell, a porter, put in certain goods, and so deposited them as to block the opening of the box of Miller, another porter. Miller, in order to get at his box, moved Bushell's parcel about a yard towards the door, and did not replace it. The goods in consequence were lost. Bushell sued Miller for a conversion of the goods. But the court held that there was no conversion, though if he had brought trespass he might have recovered. (a)

II. CONVERSION is the unauthorized disposal of the chattels of another, by which that other, having a present right to them, is deprived of the same.

§ SUCH UNAUTHORIZED DISPOSAL MAY BE EXERCISED BY—

1. The taking or using the chattels.

(a) *Bushell v. Miller*, 1 Str. 128.

- (i) For the benefit of the wrongdoer himself.
- (ii) For the benefit of a third person.

Illustration. One H. K. Bailey, falsely pretending that he was buying for one Seddon, obtained from Fowler & Co. delivery of thirteen bales of cotton, of the value of £244 19s. 8d. Bailey sold the cotton to and received the price from Hollins & Co., cotton brokers, who sold it to Nicholls & Co., by whom the cotton was spun into yarn. On discovering the fraud of Bailey, Fowler & Co. sued Hollins & Co. in trover for the cotton, and the court held that they were liable for the conversion. (b)

- 2. By the consumption, destruction, or material alteration of the chattel.

Illustration. Atkinson drew some of the contents out of a vessel containing liquor, the property of Richardson, and filled it up with water. In an action of trover it was held that this was a conversion of all the contents of the vessel. (c)

- 3. By an unqualified refusal to deliver up, after demand, what has lawfully come into the possession of the wrongdoer.

Illustration. Baldwin was a journeyman carpenter, who was sent by his master to work for hire in the Queen's yard. On his declining to go to work any longer, the surveyor of the works refused to allow him to remove his tools, pretending a usage to detain them, to enforce workmen to continue until the Queen's work was done. In an action of trover for the tools, this was held to be an act of conversion. (d)

(b) *Fowler v. Hollins*, L. R. 7 Q. B. 616.

(c) *Richardson v. Atkinson*, 1 Str. 576.

(d) *Baldwin v. Cole*, 6 Mod. Rep. 212.

4. By exercising a dominion over the goods, which is inconsistent with the dominion of the owner at all times and places.

Illustration. Hiort & Co., of Hull, corn merchants, were in the habit of employing one Grimmett as their broker. Grimmett, with a view to commit a fraud, directed Hiort & Co. to send to Bott of Birmingham, a delivery order for certain barley (which he pretended to have sold to Bott), making the barley deliverable to the order of the consignor, or the consignee, and to forward the barley by the London and North Western Railway. Hiort & Co. followed their broker's directions; and the latter then went to Bott, and told him that the delivery order had been sent to him by mistake, and induced him to indorse it to him, Grimmett, Hiort & Co.'s agent, "in order to save expense," Bott believing he was taking the best step to secure a return of the barley to Hiort & Co. Grimmett then obtained delivery of the barley, sold it, and absconded. In an action of trover for the barley by Hiort & Co., against Bott, the court held that there had been a conversion by the latter, and that he was liable for the value of the barley. (a)

§ THE ACT OF CONVERSION CANNOT BE PURGED.

Illustration. Hiort & Co. from time to time forwarded large quantities of grain by the London and North Western Railway to their own order at the company's goods station at Birmingham. On 24th November, 1872, the company received a delivery order of Hiort & Co. for sixty quarters of oats in favour of George Tarpler's order. Tarpler had indorsed it in favour of George

(a) *Hiort v. Bott*, L. R. 9 Ex. 86.

Grimmett. On November 22nd, 1872, two days before, Grimmett had fraudulently induced the company to deliver to him sixty quarters of oats, which he had realised. The company, therefore, though they had improperly delivered the sixty quarters of oats to Grimmett on the 22nd, would in two days time have been bound to do that very thing on the receipt of the delivery order; and Hiort & Co. suffered no damage. Tarpler was credited with the oats, but was unable to pay; and Grimmett had absconded. Hiort & Co. accordingly sued the company for a conversion of the oats; and the court held, that the right of action having once vested by reason of the predelivery, it could not be divested by the subsequent receipt of the delivery order. But that the company was liable for nominal damages. (b)

§ *The innocent finder of a chattel* is entitled to the possession of it against all the world, except the true owner; and may sue in trover, if wrongfully deprived of it.

Illustration. Armoury was a chimney-sweeper's boy, who found a jewel. He took it to Delamirie's (a goldsmith) shop, to learn what it was, and handed it to an apprentice. The latter on pretence of weighing it, took out the stones, and called to his master to tell the boy the value was 1½*d.* The boy refused the money, and demanded the jewel. The apprentice handed him the socket only. The boy brought an action of trover for the jewel; and it was held that he was entitled to maintain it. (c)

[See also the chapter on the sale of goods: *ante*, p. 53.]

(b) *Hiort v. London and North Western Railway Company*, 4 Ex. D. 188.

(c) *Armoury v. Delamirie*, 1 Str. 504.

CHAPTER II.

WRONGFUL DISTRESS.

[For the nature of a distress, see *ante*, p. 169.]

§ A DISTRESS WILL BE WRONGFUL IN THE FOLLOWING CASES:—

1. Where there is no tenancy existing between the distrainor and the person whose goods are distrained.

For instance. Where there has been a supposed tenancy, but the lessor has had no title to grant a lease.

[NOTE. Or, *at common law*, when the term had expired. But this was remedied by 8 Ann c. 4, ss. 6, 7, under which the landlord is empowered, where a tenant is *holding over*, to distrain within six months of the expiration of the lease, for rent due before the end thereof.]

2. Where there is no *fixed and ascertained* rent.

3. When the reversion is not in the distrainor.

For example. If the original lessor has assigned his reversion, his right to distrain is gone.

4. If the landlord has already distrained for the same rent.

Unless—

- (i) He had at the tenants' request withdrawn from possession. (*a*)
- (ii) There has been some mistake as to the value of the things taken. (*b*)
- (iii) The distress has been rendered abortive through the tenant's threats. (*c*)

(*a*) *Worlston v. Stafford*, 15 C. B. 278.

(*b*) *Hutchins v. Chambers*, 1 Burr. 579.

(*c*) *Lee v. Cooke*, 3 H. & N. 203.

5. If no rent is due.
 [NOTE. In this case the landlord is liable to an action for *double the value* of the goods distrained. (*d*)]
6. Where there is a valid agreement not to distrain. (*e*)
7. Where the rent due has been tendered before the distress. (*f*)
8. If made on the day on which the rent is due. (*g*)
9. If the entry is made by forcing the outer door, or opening the window. (*h*)
10. If made before sunrise, or after sunset. (*i*)
11. If made on land other than that from which the rent distrained for issues.

Unless—

- (i) The goods have been fraudulently removed on to it, after the rent has become due, in order to defeat the distress.

[NOTE. In which case the landlord may within thirty days follow and distrain the goods wherever they may be found.

Provided they have not been bought by a *bonâ fide* purchaser. (*k*)]

[NOTE 2. In the Metropolitan Police District, a constable may stop, and detain, vehicles, which he may find removing goods, under suspicious circumstances. (*l*)]

- (ii) Cattle are distrained, while lawfully depastured on common appendent, or appurtenant. (*m*)

(*d*) 2 W. & M. c. 5, s. 5.

(*e*) *Horsford v. Webster*, 1 C. M. & R. 696.

(*f*) *Bennett v. Bayes*, 5 H. & N. 391.

(*g*) *Duppa v. Mayo*, 1 Saund. 287.

(*h*) *Nash v. Lucas*, L. R. 2 Q. B. 590.

(*i*) Co. Litt. 142*a*.

(*k*) 8 Ann. c. 14, s. 2; 11 Geo. 2, c. 19, s. 1.

(*l*) 2 & 3 Vict. c. 47, s. 67.

(*m*) 11 Geo. 2, c. 19, s. 8.

- (iii) Cattle are *seen* to be driven off the demised premises, in order to defeat the distress. (a)
- 12. Where the distress is unreasonable, or excessive. (b)
- 13. Where made in the king's highway, or in the common street. (c)
- 14. Where the chattels taken are not liable to distress, viz. :
 - (i) Tenants' fixtures, unless attached only by bolts and screws, (d) (for they are annexed to the freehold).
 - (ii) Beasts, which profit the land.
Provided that other distress can be found, sufficient. (e)
 - (iii) Implements of husbandry, or instruments used by a man in following his calling.
Provided that other distress can be found, sufficient. (f)
 - (iv) Wearing apparel, and chattels *in actual use* (for the taking of them might lead to a breach of the peace). (f)
 - (v) Perishable articles [for they cannot be returned in their original state to the owner : and a distress is in the nature of a pledge.] (f)
 - (vi) Growing trees, shrubs, plants, &c. (g)
[NOTE. But growing crops ; and corn, straw and hay, which has been cut, may be distrained. (h)]
 - (vii) Loose money [for it is impossible to ear-mark it].
 - (viii) Title deeds [for they partake of the nature of the freehold].
 - (ix) Animals *feræ naturæ*. (f)

(a) Co. Litt. 161a.

(b) 52 Hen. 3, c. 4. Statute of Marlbridge.

(c) *Ibid*, c. 15.

(d) Co. Litt. 47b.

(e) 51 Hen. 3, c. 4.

(f) Co. Litt. 47a.

(g) *Clark v. Culvert*, 3 Moore, 96.

(h) 11 Geo. 2, c. 19, s. 8.

- (x) The goods of another left *ex necessitate* on the premises (a.) In the ordinary course of trade; or (β.) To be worked upon by the tenant. (i)
- (xi) The goods of a lodger. (k)
- (xii) The goods, and beasts, of a guest at an inn. (l)
- (xiii) The goods of an ambassador. (m)
- (xiv) Goods in *custodiâ legis*. (n)
- (xv) Railway rolling stock, when on hire. (o)
- (xvi) Gas metres, belonging to a gas company incorporated under an Act of Parliament. (p)

[Subject to the above exceptions all goods, and animals, found on the demised premises, may be lawfully distrained, no matter to whom belonging.]

REMEDIES.

- I. An action for trespass, and the conversion of the goods.
 - II. An action for double the value of the goods distrained in cases where
 - 1. There is no rent in arrear, and
 - 2. The goods distrained upon have been sold. (q)
 - III. An action of *replevin* [*replegiare*, to receive again on giving a pledge], where the tenant desires a return of the goods themselves.
- § This is an action to try the right to the goods, the tenant receiving them back, *pendente lite*, upon giving security for their value, and for costs.

[NOTE. *The course of procedure in replevin is as follows* :— The tenant at any time after seizure, and

(i) *Swire v. Leech*, 18 C. B. N. S. 479; Co. Litt. 47a.

(k) 34 & 35 Vict. c. 79.

(l) *Crozier v. Tomkinson*, 2 Ken. 439.

(m) 7 Ann. c. 12, s. 3.

(n) *Wharton v. Naylor*, 12 Q. B. 673.

(o) 35 & 36 Vict. c. 50, s. 3.

(p) 10 & 11 Vict. c. 15, s. 14.

(q) 2 W. & M. c. 5, s. 5.

before the goods have been sold, may apply to the registrar of the county court of the district, in which the distress has been made, for the return of the goods taken. The registrar will then restore (replevy) them to him, upon the following terms: (a)

1. That the replevisor (the tenant) will commence, and prosecute, without delay, an action of replevin against the distrainor, to try the right to the goods.

(i) If in the county court, within one month. (b)

(ii) If in the superior court, within five days. (c)

[NOTE. He is only entitled to sue in a superior court, if he has good grounds for believing—

(a.) That a question of title is involved. (c)

(β.) That the rent distrained for exceeded twenty pounds.]

2. That the replevisor shall, to the satisfaction of the registrar, give security,

(i) Either a bond with sureties; or,

(ii) Cash, accompanied by a memorandum of deposit,

sufficient to cover the rent alleged to be due, and the costs of the action. (d)

3. If he is unable to make out his claim, he shall return the goods. (e)

§ If upon the trial of the action the replevisor fails to make out his title to the goods, he will have to return them to the distrainor. (e)

§ If he wins the action, he will [having already got

(a) 19 & 20 Vict. 108, ss. 63, 64.

(b) *Ibid*, s. 66.

(c) *Ibid*, s. 65.

(d) *Ibid*, ss. 65, 66, 70, 71.

(e) *Ibid*, ss. 65, 66.

possession of the goods], only be entitled to recover the expenses of the replevy.

§ And as these are usually under £5, he will consequently not be entitled to any costs, either of counsel or solicitor. (*f*)]

§ **AVOWRY AND COGNISANCE** were, under the old system of pleading, the names of the pleas to a declaration in replevin, confessing and justifying the seizure.

1. The first pleaded by the landlord.

2. The second by the bailiff, who acted under his orders.

IV. SUMMARY PROCEEDINGS WITHIN THE METROPOLITAN DISTRICT

(*g*) may be taken on summons before a stipendiary, where—

1. The tenancy is a weekly or a monthly one ; or

2. The rent does not exceed £15 per annum.

§ Who has jurisdiction—

(i) To order the return of the distress, on payment of the rent due (if any) ; or

(ii) If it has been sold, the return of its value, less any sum due for rent ; or

(iii) In default of compliance, to impose a fine of not more than £15, to be paid by the landlord to the aggrieved tenant. (*h*)

(*f*) 9 & 10 Vict. c. 95, s. 91.

(*g*) The limits of the Metropolitan District are defined in the Schedule to 10 Geo. 4, c. 44.

(*h*) 2 & 3 Vict. c. 71, s. 39.

P A R T I V.

OF BREACHES OF DUTY IN THE MANAGEMENT OF CHATTELS.

CHAPTER I.

OF THE NEGLIGENT USE OF CHATTELS.

§ **NEGLIGENCE.** It is the duty of all persons to use reasonable care, and skill, in dealing with any chattel : and if one is negligent in his performance of this duty, and mischief or loss ensues to the person, or property [*real or personal*], of another, he will be answerable to that other in damages.

For example—

1. If Smith points a loaded gun, at full cock, towards Jones ; and the gun goes off, and wounds the latter ;
2. If on a dark night, the servants of a railway company pull up a train some yards short of the platform, and invite passengers to alight ; so that a passenger, alighting, is precipitated to the ground, and injured ;
3. If Brown drives a cart rapidly in a public street, and so knocks down, and injures Robinson ;
4. If Green carries a plank so carelessly, that he runs it through a plate-glass door ;
5. If Grey navigates a vessel so carelessly, that it injures a pier, or a landing stage ;
6. If Johnson insecurely leans a door against the wall of his house, and the door is blown down by the wind on to Williams, who happens to be passing by and is thereby injured ;

The party injured, whether in his person, or his property, (real, or personal,) is entitled to compensation from the party guilty of the negligence.

§ **CONTRIBUTORY NEGLIGENCE.** If, however, the party injured has, by his own want of reasonable care, contributed to the happening of the injury, then the party guilty of the original act of negligence is absolved.

For example—

1. If Jones had persisted in dodging in front of Smith's gun, and daring him to have a shot at him.
2. If the passenger had got out of the train before it had stopped.
3. If Robinson could have got out of Brown's way, had he been looking where he was going.
4. If the plate-glass door was built in a passage, where no one would expect such a thing, and Green was entitled to go down the passage, and no notice was given to him of the position of the glass door.
5. If Grey had been misled by lights improperly exhibited by the owners of the pier or landing stage.
6. If Williams had carelessly stumbled against the door, and helped to bring it down upon himself.

Then the parties, who have suffered the damage, are in that position through their own folly, and are not entitled to compensation.

§ *Provided—*

- (i) That the injury resulting is the necessary, ordinary, and likely consequence of the contributory negligence.

Illustration. Swan owned certain shares in the North British Australasian Company, and also in another Australian Company. He was intending to transfer the latter, and was induced by his broker Oliver to execute a blank transfer. Oliver fraudulently filled in the numbers and

description of Swan's shares in the North British Company, and effected a sale to a nominee of his own. In order to get the transfers registered, it was necessary to produce to the North British Company's secretary the share certificates. Swan had left these in Oliver's charge, locked in a box, of which he, Swan, kept the key. Oliver, however, got a duplicate key, stole the certificates, and got the transfer registered. Swan afterwards, on discovering the fraud, brought an action against the company for wrongfully removing his name from the list of shareholders. The defendants set up a defence of contributory negligence on the part of Swan in executing the blank transfer, by which Oliver was enabled to commit the fraud. But the Court held that the proximate cause of the fraud being successfully carried out, was the felonious act of Oliver in stealing the certificates, and not the negligence of the plaintiff, and that the latter was entitled to judgment. (a)

- (ii) The contributory negligence is such as to preclude the party primarily guilty of negligence from avoiding the consequences of such contributory negligence by the use of reasonable care.

Illustration. Davies had a donkey which he "hobbled," and turned into the high road. Mann's waggon and horses came along at a smartish pace, knocked down the donkey, and ran over it. In an action by Davies against Mann for the injury done to the donkey, the defendant contended that the plaintiff's negligence in leaving the donkey, hobbled, in the highway, contributed to the donkey's death. But the court

(a) *Swan v. North British Australasian Company*, 32 L. J. Ex. 273.

held that this was no justification, if by driving carefully the defendant could have avoided the donkey, and pulled up in time to let him get out of the way. (b)

3. The act of contributory negligence is an independent act, and not an act resulting in the moment of peril from the original act of negligence.

Illustration. "The Princess Alice," a paddle steamer, coming up the Thames with some 600 passengers on board, was being navigated in a careless and reckless manner. Near Tripcock Point she came into collision with a screw steamer called "The Bywell Castle." Till the moment of the collision the latter was not to blame. But just as the two vessels came together, she hard-ported; the consequence of which was that the collision was much more serious, and "The Princess Alice" sank with all on board. "The Bywell Castle," also, being considerably injured. Cross claims being brought in the Admiralty Court by the owners of the two vessels, it was held, on appeal, that if one ship puts another in a position of extreme peril, and that other ship, at such moment, contributes to the mischief, the latter will not be liable; as perfect presence of mind, accurate judgment, and promptitude, under all circumstances are not to be expected. (c)

WHERE AN INJURY TO THE PERSON RESULTS IN DEATH.

- § In all cases where an injury to the person has arisen from
1. negligence—
 2. In the management of realty;
In the management of chattels;

(b) *Davies v. Mann*, 10 M. & W. 546.

(c) *The Bywell Castle*, 4 P. D. 219.

3. In the conduct of the person ;
the right of action *at common law* lapses with the death of the party injured ; for “*actio personalis moritur cum personâ.*”

§ But, by virtue of Lord Campbell’s Act, (a) the right of action survives for the benefit of the wife, husband, parent, grandparent, stepparent, children, stepchildren, and grandchildren of the deceased ; and an action will lie against the party guilty of the negligence.

Provided—

1. The death was caused by the wilful act, neglect, or default of the defendant.
2. The deceased, if he had lived, would have had a right of action for his personal injuries.
3. The action is brought in the name of the executors or administrators of the deceased.
4. Within twelve months of his decease.
5. Full particulars of the persons for whose benefit the action is brought, are delivered to the defendant with the statement of claim.

§ THE LIABILITY OF SHIPOWNERS IS LIMITED TO £15 PER TON OF THE REGISTERED TONNAGE OF THE VESSEL, in all cases where *loss of life or personal injury* has occurred through any wrongful act, neglect, or default, for which they are liable,

1. To any person carried on such ship ;
2. To any person carried on another vessel ;

Provided it has happened without their actual fault or privity. (b)

§ THE BOARD OF TRADE has power, in its discretion, to hold an inquiry into the matter before a jury ; in which case (c)

- (i) No more than £30 can be recovered. (d)

(a) 9 & 10 Vict. c. 93.

(b) 25 & 26 Vict. c. 63, s. 54.

(c) 17 & 18 Vict. c. 104, ss. 507, 510.

(d) *Ibid.*, s. 510.

- (ii) The sum recovered is paid in priority to all other claims. (e)
- (iii) The Board may arrange a compromise between the shipowner and the plaintiff. (f)
- (iv) The plaintiff, if dissatisfied, may repudiate the proceedings of the Board of Trade; and bring his action. (g)

Upon the terms—

- (a.) That any sum recovered is payable after other claims, substantiated at the Board of Trade inquiry, have been satisfied. (g)
- (β.) That, unless the plaintiff in his action recovers double the statutory amount of £30, he will have to pay the defendant's costs. (g)
- (γ.) That he does not commence his action, until the Board of Trade have either completed, or determined not to hold, an inquiry. (h)

§ IN ACTIONS FOR NEGLIGENCE

1. *It is the duty of the judge* to say if any evidence has been given by the plaintiff, from which the inferences *may* reasonably be made,

- (i) That there was negligence on the part of the defendant;
- (ii) That the negligence (if any) was connected with the injury happening to the plaintiff.

If in his opinion there has not, it is his duty to nonsuit the plaintiff.

If in his opinion there has, he must leave the case to the jury.

2. *It is the duty of the jury* to say, upon the evidence given by the plaintiff, and on any counter-evidence, which may be given by the defendant, whether such inferences *ought* to be made. That is

(e) *Ibid*, s. 510.

(g) *Ibid*, s. 511.

(f) *Ibid*, s. 509.

(h) *Ibid*, s. 512.

- (i) Whether *they believe* that the defendant was negligent, and
- (ii) Whether *they believe* that the plaintiff's injury did result from the defendant's negligence.
- [(iii) Whether they believe that the plaintiff himself contributed to the result.] (a)

(a) See the judgments of Lord CAIRNS and Lord BLACKBURN in *Jackson v. Metropolitan Railway Company*, 3 Ap. Ca. 197, 198, 207, 208.

CHAPTER II.

NEGLIGENT CONDUCT OF THE BAILEES OF CHATTELS.

§ With the different kinds of bailments we have already dealt (*ante*, p. 82). It remains to consider the different degrees of care, which the three different classes of bailees are bound to exercise.

More care is required of some than others.

§ It is a question for the jury to decide, taking into consideration the circumstances of each case, and subject to the following general rules, whether *due care* has been exercised by the particular bailee, whose conduct is brought before them. (*b*)

1. **GRATUITOUS BAILEES** [that is, bailees in the cases of *depositum* and *mandatum*] are bound to exercise, *Slight diligence* [*levissima diligentia*], and are liable only for the converse, which is *Gross negligence* [*lata culpa*], viz.: the absence of that ordinary diligence, which men of common prudence generally exercise about their own affairs, and such skill as a man actually has. (*c*)
2. **BAILEES FOR REWARD** [that is, bailees in the cases of *vadium*, *locatio rei*, and *locatio operis faciendi*] are bound to exercise, *Ordinary diligence* [*diligentia*], and are liable for its converse, which is

(*b*) *Doorman v. Jenkins*, 2 A.d. & E. 256.

(*c*) Per Ld. CHELMSFORD in *Giblin v. McMullin*, L. R. 2 P. C. 337; and per POLLOCK, C. B., in *Beal v. South Devon Railway Company*, 5 H. & N. 881; *Vaughan v. Menlove*, 3 Bing. N. C. 475; Story on Bailments, 8th edit. §§ 11, 16, 17, 18.

Ordinary negligence [*culpa levis*], viz.: the absence of such skill, as a person ought to have in the business, which he undertakes; and the absence of such care and diligence, as are ordinarily exercised in the proper course of such business. (a)

3. **BORROWERS** [bailees in the case of *commodatum*] who are bound to exercise,

The utmost care [*exactissima diligentia*], and are liable for the converse, which is

The least negligence [*levissima culpa*], viz., any negligence short of pure accident [*casus*]. (b)

[NOTE. *Contributory negligence*, is also a defence to an action for a breach of the duties referred to in this chapter; and the remarks on contributory negligence in the last chapter apply equally to this one.]

(a) Per POLLOCK, C. B., in *Beal v. South Devon Railway Company*, 5 H. & N. 881; Story on Bailments, 8th edit. §§ 11, 16, 17, 18.

(b) Campbell on Negligence, p. 15; Story on Bailments, 8th edit. §§ 11, 16, 17, 18.

PART V.

OF THE INFRINGEMENT OF THE RIGHTS OF THE PERSON.

CHAPTER I.

BATTERY, AND ASSAULT.

§ A BATTERY is the unlawful laying of hands on another without his consent. {

[This includes striking him with a missile.]

§ AN ASSAULT is an attempt at a battery.

§ THEY ARE JUSTIFIABLE ONLY, WHEN COMMITTED —

1. In self-defence, or the defence of a wife, or a servant. (c)
2. In ejecting a trespasser. (d)
3. In defence of a house, or of goods. (e)
4. In resisting a forcible entry by a landlord. (f)
5. In obedience to some legal warrant. (g)
6. Through inevitable accident without negligence. (h)
7. By a parent, schoolmaster, or master, in moderately chastising his child, pupil, or apprentice. (i)

Provided so much force only is used as is necessary for the due performance of these acts, and no more.

(c) *Seward v. Basely*, 1 Salk. 407.

(d) *Weaver v. Buck*, 8 T. R. 78.

(e) *Roberts v. Taylor*, 1 C. B. 147.

(f) *Polkinghorn v. Wright*, 8 Q. B. 206.

(g) *Buron v. Denman*, 3 Ex. 167.

(h) *Gibbons v. Pepper*, 2 Salk. 637.

(i) *Fitzgerald v. Northcote*, 4 F. & F. 656 ; *Penn v. Ward*, 2 C. M. & R. 338.

CHAPTER II.

OF FALSE IMPRISONMENT.

§ FALSE IMPRISONMENT is the unlawful arrest or detainer of another without legal authority.

1. By private persons.
2. By officers of justice.
 - (i.) Without a warrant.
 - (ii.) By an illegal warrant.
 - (iii.) By a legal warrant at an unlawful time.

[NOTE. A person will be liable to an action for false imprisonment if he authorizes, or subsequently ratifies, the wrongful act of his agent.]

§ ARREST AND DETAINER IS JUSTIFIABLE.

I. *By private persons.*

1. Where a FELONY has been committed by some person, and there was reasonable cause to suspect the person arrested of having committed it. (a)

[NOTE. Arrest is unjustifiable where there is only a suspicion that the person arrested has committed a misdemeanor. (b)]
2. Where any person is found committing,
 - (i) Any offence under the "Prevention of Crimes Act, 1851." (c)
 - (ii) Any offence under the "Larceny Act, 1861" (except angling in the daytime). (d)

(a) *Allen v. Wright*, 8 C. & P. 526.

(b) *Fox v. Gaunt*, 3 B. & Ad. 800.

(c) 14 & 15 Vict. c. 19, s. 11.

(d) 24 & 25 Vict. c. 96, s. 103.

- (iii) Any offence under the "Malicious Injuries Act, 1861." (*e*)
[So long as the person making the arrest is the owner of the property injured, or some one acting with his authority.]
- (iv) Any offence under sect. 4 of the "Vagrant Act, 1824." (*f*)
- (v) Any offence under the "Metropolitan Police Act." (*g*) [So long as the person making the arrest is the owner of the property in respect of which the offence is committed, or some one acting with his authority.]
- (vi) Any coinage offence. (*h*)
- 3. Where any person to whom property is offered to be sold, pawned, or delivered has reasonable cause to suspect that an offence under the "Larceny Act, 1861," (*i*) has been committed, he may arrest the person so offering it. (*i*)
- 4. Where there is an actual breach of the peace being committed, the affrayers may be arrested at the moment of the affray. (*k*)
- 5. Persons making a disturbance in a church, chapel, or burial ground may be arrested by the churchwardens. (*l*)
- 6. Where persons on board a passenger steamer, their names being unknown, have committed certain specified offences under the Merchant Shipping Act, 1862, they may be arrested by any of the ship's officers, and persons called to their assistance. (*m*)

(*e*) 24 & 25 Vict. c. 97. s. 61.

(*f*) 5 Geo. 4, c. 83, s. 4.

(*g*) 2 & 3 Vict. c. 47, s. 66.

(*h*) 24 & 25 Vict. c. 99, s. 31.

(*i*) 24 & 25 Vict. c. 96, s. 103.

(*k*) *Price v. Seeley*, 10 Cl. & F. 39.

(*l*) 23 & 24 Vict. c. 32, ss. 2, 3.

(*m*) 25 & 26 Vict. c. 63, s. 37.

7. Where a seaman deserts from, or refuses to join his ship, he may be arrested by the master, mate, owner, ship's husband, or consignee. (*a*)
8. Where the arrest is of a principal by his bail. (*b*)
9. Where power is given, by their private acts, to railway companies to arrest, by their servants, persons whose names are unknown, and who have committed certain offences specified in those acts.
10. Where a person travels on a railway without paying his fare, with intent to avoid paying it, he may be arrested by the company's servants. (*c*)
11. Where the prisoner has committed an offence under the "Cruelty to Animals Act, 1835," he may be apprehended *on the view*, by the owner of the animal. (*d*)
12. A water bailiff and his assistants may apprehend any person found at night,
 - (i) Taking, or killing, salmon ;
 - (ii) Being near a salmon river with intent to take, or kill, a salmon ;
 - (iii) Having in his possession any instrument forbidden by the Salmon Acts, 1861, 1873. (*e*)
13. Where the prisoner has been *found committing* an offence under the "Night Poaching Act," he may be apprehended by the owner or occupier of the land where the offence has been committed, or the lord of the manor, or their gamekeepers or servants. (*f*)
14. Where the prisoner has been obstructing an inspector

(*a*) 17 & 18 Vict. c. 104, s. 246.

(*b*) *Anon.* 6 Mod. 231.

(*c*) 8 Vict. c. 20, ss. 103, 104.

(*d*) 5 & 6 Will. 4, c. 59, s. 9.

(*e*) 36 & 37 Vict. c. 70, s. 105.

(*f*) 9 Geo. 4, c. 69, s. 2 ; 7 & 8 Vict. c. 29.

or other officer acting under the "Contagious Diseases (Animals) Act, 1869." (g)

15. Where the prisoner was *found committing* an act for which he is liable to a penalty under "The Explosive Substances Act, 1875," he may be apprehended by an officer of "the local authority," or by the occupier of the premises endangered by such act, or by his agent. (h)
16. Where the prisoner, whose name is unknown, has attempted to cheat a tramway company, the servants of the company may arrest him. (i)
17. An inmate of a workhouse or casual ward guilty of disorderly conduct may be arrested by the master or porter of the workhouse. (k)
18. Where a pedlar refuses to show his license to—
 - (i) A justice of the peace;
 - (ii) Any person to whom he offers goods for sale;
 - (iii) Any person on whose premises he may be;
 such person may apprehend him. (l)
19. Where the driver of any waggon or cart on any highway—
 - (i) Rides on the vehicle or horses (when not driven with reins);
 - (ii) Negligently or wilfully causes damage to what is passing him;
 - (iii) Quits the road and goes on the other side of the hedge;
 - (iv) Is negligently at too great a distance from his horses to have them under control;

(g) 32 & 33 Vict. c. 108, s. 8.

(h) 38 Vict. c. 17, s. 78.

(i) 33 & 34 Vict. c. 78, s. 52.

(k) 34 & 35 Vict. c. 108, s. 8.

(l) 34 & 35 Vict. c. 96, s. 18.

- (v) Leaves his vehicle so as to obstruct the highway;
- (vi) Does not have the owner's name painted on the vehicle, and refuses to give such name;
- (vii) Does not keep on the near side of the road
- (viii) Wilfully prevents another from passing him;
- (ix) Rides or drives furiously;

He may be arrested by any person who *sees him committing the offence.* (a)

- 20. Where, in a royal park or garden, the prisoner has committed an offence against "The Royal Parks and Gardens Act, 1872," *within the view* of the parkkeeper, and his name and address is unknown, he may be apprehended by such parkkeeper. (b)
- 21. Where any person sees another wilfully damaging lamps or property vested in the Metropolitan Board of Works or a vestry and apprehends him. (c)
- 22. Where the prisoner, whose name is unknown, has committed an offence against the "Metropolis Local Management Act, 1855," or any bye-law made thereunder, he may be apprehended by any servant of the Metropolitan Board or of a vestry. (d)
- 23. Where the prisoner has produced to a pawnbroker a ticket which the latter reasonably suspects to be forged, altered, or counterfeited, the pawnbroker may apprehend him. (e)
- 24. Where the prisoner has exposed spirits for sale elsewhere than in a duly licensed place. (f)

(a) 5 & 6 Will. 4, c. 50, s. 78.

(b) 35 & 36 Vict. c. 15, s. 5.

(c) 18 & 19 Vict. c. 120, s. 206.

(d) *Ibid.* s. 229.

(e) 35 & 36 Vict. c. 93, s. 49.

(f) 23 & 24 Vict. c. 114, s. 197.

25. Where a man has voluntarily gone into a duly licensed "retreat" under the "Habitual Drunkards Act, 1879," he may be forcibly detained there during the period he has agreed to remain there. (*g*)
26. Where a person is a dangerous lunatic, and likely to do immediate mischief to himself or others, he may be secured until the legal forms for his removal can be carried out. (*h*)
27. When a person is of unsound mind, *provided* the procedure ordered by the Lunacy Acts has been duly followed. (*i*)

§ THE FOLLOWING COURSES OF ACTION ARE PROVIDED BY THE LUNACY ACTS.

(i) *Inquisition*. An inquisition will be held upon the petition of the next of kin of the lunatic (supported by affidavits as to particulars of the case by members of the family and of two medical men) to the Lord Chancellor, who will make an order for an inquiry before one of the masters in lunacy,

§ The alleged lunatic may, if he desires it, be tried as to his sanity by a jury.

§ If lunacy is found, the masters make provision, if necessary, for the lunatic's family, and appoint "committees" of the lunatic's person and estate, who act under the direction of the masters. (*k*)

(ii) *Private patients* may be received into a

(*g*) 42 & 43 Vict. c. 19, s. 10.

(*h*) Bro. Abr. Faux imp. p. 28.

(*i*) 8 & 9 Vict. c. 100; 16 & 17 Vict. c. 7, and c. 96; 25 & 26 Vict. c. 111.

(*k*) 16 & 17 Vict. c. 70.

duly *licensed house* or *registered hospital*, (a)

(a) Upon the *written request* of any person connected with the lunatic, giving

(β.) Full *particulars* of the case, and accompanied by

(γ.) A *medical certificate*, signed by *two* medical men, who have separately examined the patient personally within seven clear days of the patient's, removal.

(iii) A *single private patient* may be received in an *unlicensed* house, for profit, to board and lodge; upon *the same orders and certificates* as are required by the owners of duly licensed houses.

[Copies of these documents must within one clear day be sent to the office of the Lunacy Commissioners.]

§ They are under the superintendence of the Commissioners in Lunacy, and are visited once a fortnight. (b)

(iv) *Any person of unsound mind may be maintained in private by his relatives where no profit is made by his maintenance*, without any interference on the part of the law.

§ The Lord Chancellor or Home Secretary can at any time order a visitation of, or an inquiry and report upon, such persons and the place of their confinement. (c)

(a) 16 & 17 Vict. c. 96, s. 4.

(b) 8 & 9 Vict. c. 100, s. 90; 16 & 17 Vict. c. 96, ss. 4, 8; 25 & 26 Vict. c. 111, s. 28.

(c) 8 & 9 Vict. c. 100, ss. 112, 113.

(v) *A pauper lunatic* may be received into a county or borough asylum. (d)

(a.) Upon *the order* of

1. One justice, or an officiating clergyman and

2. The relieving officer, or one of the overseers of the union,

(β.) Accompanied by *full particulars* of the case

(γ.) And the *certificate of a medical man* who has personally examined the patient within seven clear days of the patient's removal.

[NOTE. Private *paying* patients may be received into county asylums in ~~the~~ discretion of the visiting committee. (e)]

II. *By officers of justice.*

1. Where the officer has reasonable ground for believing that the prisoner has committed a felony. (f)

[NOTE. But he has no power *at common law* to arrest a person on suspicion of his having been guilty of a *misdemeanor*. (g)]

2. Where the prisoner has been *found committing*

(i) An offence under the "Prevention of Crime Act, 1851." (h)

(ii) An offence under the "Larceny Act, 1861," (except angling in the daytime). (i)

(d) 16 & 17 Vict. c. 96, s. 7.

(e) 16 & 17 Vict. c. 97, s. 43.

(f) *Beckwith v. Philby*, 6 B. & C. 635.

(g) *Bowditch v. Balchin*, 5 Ex. 380.

(h) 14 & 15 Vict. c. 19, s. 10.

(i) 24 & 25 Vict. c. 96, s. 103.

- (iii) An offence under the "Malicious Injuries Act, 1861." (*a*)
- (iv) An offence under the "Vagrant Act, 1824." (*b*)
- (v) Any coinage offence. (*c*)
- (vi) Any indictable offence between 9 p.m. and 6 a.m. (*d*)
- 3. Where the prisoner has committed a breach of the peace *within the officer's view*. (*e*)
- 4. Where the prisoner has hindered him in preventing a breach of the peace. (*f*)
- 5. Where the prisoner has been making a disturbance in any church, chapel, or burial ground. (*g*)
- 6. Where within the metropolitan police district—
 - (i) The prisoner has, *within the officer's view*, committed—
 - (*a*.) An offence under s. 54 of the "Metropolitan Police Act, 1839 ;"
 - (*β*.) Any offence under that Act, *if his name and address cannot be ascertained*. (*h*)
 - (ii) The prisoner—
 - (*a*.) Is loose, idle, and disorderly, and disturbing the public peace.
 - (*β*.) Has given cause to the officer to suspect him of having committed, or being about to commit a felony, misdemeanor, or breach of the peace.
 - (*γ*.) Is found between sunset and 8 a.m. lying or loitering in any highway, yard, or place, and unable to give a satisfactory account of himself. (*i*)

(*a*) 24 & 25 Vict. c. 97, s. 61.

(*b*) 5 Geo. 4, c. 83.

(*c*) 24 & 25 Vict. c. 99, s. 31.

(*d*) 14 & 15 Vict. c. 19, s. 11.

(*e*) *Reg. v. Light*, 27 L. J. M. C. 1.

(*f*) *Levy v. Edwards*, 1 C. & P. 40.

(*g*) 23 & 24 Vict. c. 32, ss. 2, 3.

(*h*) 2 & 3 Vict. c. 47, ss. 54, 63.

(*i*) *Ibid*, s. 64.

- (iii) The prisoner, by committing any offence against the Metropolitan Police Act, has caused any damage to person or property. (*k*)
- (iv) Where the prisoner is charged by another with having committed an aggravated assault. (*l*)
- (v) Where the prisoner is *found committing* an offence punishable, either upon indictment or as a misdemeanor, upon summary conviction under the "Metropolitan Police Act, 1839." (*m*)
- 7. Where the prisoner is found lying or loitering in a highway, yard, or place at night, and the officer has good reason for suspecting that he has committed, or is about to commit, an offence against the Act relating to offences against the person (1861). (*n*)
- 8. Where an offence has been committed by the prisoner under "The Cruelty to Animals Act, 1835." (*o*)
- 9. Where a woman neglects, or refuses, to obey an order under the "Contagious Diseases Act, 1866," to go into hospital. (*p*)
- 10. Where the prisoner is *found committing* an act under the "Explosive Substances Act, 1875," for which he is liable to a penalty. (*q*)
- 11. Where the prisoner has, *within his view*, done damage in a public garden. (*r*)
- 12. Where the prisoner has refused to produce his gun license, and to give his name, on demand. (*s*)
- 13. Where a pedlar refuses to produce his license. (*t*)

(*k*) *Ibid*, s. 62.

(*l*) *Ibid*, s. 65.

(*m*) *Ibid*, s. 66.

(*n*) 24 & 25 Vict. c. 100, s. 66.

(*o*) 5 & 6 Will. 4, c. 59, s. 9.

(*p*) 29 Vict. c. 35, s. 21.

(*q*) 38 Vict. c. 17, s. 78.

(*r*) 26 & 27 Vict. c. 13, s. 5.

(*s*) 33 & 34 Vict. c. 57, s. 9.

(*t*) 34 & 35 Vict. c. 96, s. 18.

14. Where the prisoner is *unlawfully* acting as driver, conductor, or waterman to any hackney carriage, or metropolitan stage coach. (*a*)
15. Where the prisoner is *found committing* an offence under section 78 of the "Highway Act, 1835" (see *ante*, p. 233). (*b*)
16. Where in any highway or public place the prisoner has been
 - (i) Drunk and riotous, or drunk and disorderly.
 - (ii) Drunk while in charge of any carriage, horse, cattle, or steam engine.
 - (iii) Drunk while in possession of fire arms. (*c*)
17. Where the prisoner (not a *bonâ fide* traveller) is found on licensed premises during prohibited hours, and refuses to give his name and address, or evidence of its correctness. (*d*)
18. Where, *within his view*, the prisoner has damaged lamps, or other property of the Metropolitan Board of Works, or of a vestry, or has committed any offence against the "Metropolis Management Act, 1855," or any bye-laws made thereunder. (*e*)
19. Where, *within his view*, the prisoner has wilfully disregarded the regulations of the commissioner of police made under the "Metropolitan Streets Act, 1867." (*f*)
20. Where the prisoner has, *within the officer's view*, assembled with two or more others in any street within the metropolis for the purpose of betting. (*g*)
21. Where the prisoner has exposed spirits for sale elsewhere than in a duly licensed place. (*h*)

(*a*) 6 & 7 Vict. c. 86, s. 27.

(*b*) 5 & 6 Will. 4, c. 50, s. 78.

(*c*) 35 & 36 Vict. c. 94, s. 12.

(*d*) *Ibid*, s. 25.

(*e*) 18 & 19 Vict. c. 120, ss. 206, 229.

(*f*) 30 & 31 Vict. c. 134, s. 12.

(*g*) *Ibid*, s. 23.

(*h*) 23 & 24 Vict. c. 114, s. 197.

22. Where the prisoner has thrown ballast, stones, gravel, rubbish, ashes, &c., or caused offensive matter to flow into the river Thames. (*i*)
23. Where the prisoner has, *within the officer's view*, driven cattle within the parish of Islington upon a Sunday. (*k*)
24. Where the prisoner has been apprehended under a warrant under the hand and seal of a justice of the peace within the jurisdiction of such justice. (*l*)

§ PROVISIONS HAVE BEEN MADE IN MANY STATUTES UNDER WHICH AUTHORITY TO ARREST ANOTHER WITHOUT A WARRANT HAS BEEN GIVEN, FOR THE PROTECTION OF THOSE WHO HAVE ACTED IN PURSUANCE OF SUCH STATUTES.

§ SUCH PROVISIONS ARE :—

1. The making of the cause of action local.
2. The limiting the period within which an action may be brought.
3. The prohibiting the party aggrieved from recovering after tender of sufficient amends.
4. The requiring *notice of action* to be given before the issuing of a writ.

§ *The defendant is entitled to notice of action even when no offence has been committed by the Plaintiff, provided*

1. He *bonâ fide* believed in the existence of those facts which (if they had existed) would have afforded a justification under the statute. (*m*)
2. Some facts did exist which might give rise to a *bonâ fide* belief. (*n*)

[NOTE. But the belief need *not* necessarily be *reasonable*. (*n*)]

(*i*) 27 & 28 Vict. c. 113, s. 74.

(*k*) 20 & 21 Vict. c. xxi, s. 4.

(*l*) 24 Geo. 2, c. 44, s. 6 ; 11 & 12 Vict. c. 43, s. 19.

(*m*) *Roberts v. Orchard*, 2 H. & C. 774.

(*n*) *Herman v. Seneschall*, 32 L. J. C. P. 43 ; *Chamberlain v. King*, L. R. 6 C. P. 474.

Illustration. King, an artillery officer quartered at Sheerness, saw from the mess-room window through a telescope a waterman, named Chamberlain, approach in his boat to a half sunk buoy in the river Medway belonging to the War Department and remove the buoy and its anchor. He gave Chamberlain into custody the same evening for stealing the property of the War Department. It appeared that Chamberlain had been told by the coxswain of the Sheerness garrison boat that he would get salvage for any buoys or targets which he found adrift, and that he removed the buoy in question in the belief that it was in danger and that he would be rewarded for rescuing it. Upon these facts the court held that King was entitled to notice of action. (a)

(a) *Chamberlain v. King*, L. R. 6 C. P. 474.

CHAPTER III.

OF MALICIOUS PROSECUTION AND CONSPIRACY.

I. MALICIOUS PROSECUTION is a putting in motion of the criminal law against another, of malice, and without reasonable cause.

§ **IN ORDER TO SUPPORT THIS ACTION THE PLAINTIFF MUST SHOW—**

1. A putting in motion of the criminal law against himself by the defendant.
2. A determination thereof in his favour.
3. That it was done “maliciously.”

[NOTE. “*Malice*” means any motive other than that of *bond fide* bringing an offender to justice.

Illustration. The Midland Railway Company found that from time to time tarpaulings were stolen from them. Lander, their London superintendent, found a small piece of tarpauling, with the company’s name on it, in the possession of Stevens, a respectable grocer in Gloucester. He gave a satisfactory account of how he became possessed of it, but the company, according to Lander, “were determined to punish someone, in order to deter others from committing similar depredations;” and preferred an indictment at the assizes. The judge at the trial stopped the case; and, on Stevens suing the company for malicious prosecution, it was held that there was abundant evidence of malice. (b)]

(b) *Stevens v. Midland Railway Company*, 10 Ex. 356.

4. Without reasonable cause.

[NOTE. "*Reasonable cause*" is a state of facts from which a reasonable man might honestly believe that he is justified in taking criminal proceedings.

Illustration. Comerford was an active member of an association for the repressing of disorderly houses. He received information, which he honestly believed, from two persons, whom he knew to be of the highest respectability, that Chatfield and his wife kept a disorderly house, that prostitutes frequented it, and that the police had reported disturbances in it. Upon this he charged them with keeping a common bawdy house; but the charge not being substantiated, Chatfield sued him for malicious prosecution, and COCKBURN, C. J., held that there was reasonable cause for Comerford's belief. (a)]

§ No action will lie, however great the spite of the prosecutor, provided there was reasonable cause for the prosecution. (b)

§ No action will lie, notwithstanding the want of reasonable cause, provided there is no malice. (c)

§ But the jury may *infer* malice from the want of reasonable cause. (d)

§ REASONABLE CAUSE IS A QUESTION OF LAW FOR THE JUDGE, and not for the jury, to determine; both in cases of malicious prosecution, and also of false imprisonment. (e)
Where it is incumbent (as in the case of malicious

(a) *Chatfield v. Comerford*, 4 F. & F. 1,008.

(b) *Johnstone v. Sutton*, 1 T. R. 545.

(c) *Willans v. Taylor*, 6 Bing. 186.

(d) *Turner v. Ambler*, 10 Q. B. 261; *Busst v. Gibbons*, 30 L. J. Ex. 75.

(e) *Hailes v. Marks*, 7 H. & N. 56.

prosecution) for the plaintiff to make out a case of want of a reasonable cause, the judge, on the plaintiff's failing to do so, may nonsuit him. (*f*)

If he holds that there is a *prima facie* case of want of reasonable cause made out, the defendant will then be entitled to give evidence in rebuttal.

And, where there is a conflict of testimony as to the facts, the jury will have to find the issues as to those facts upon the whole evidence before them [and also to say whether the Defendant was actuated by malice].

It is then the duty of the judge to say, upon the undisputed facts, and the findings of the jury upon the disputed facts, whether, in his opinion, the defendant had any reasonable grounds for instituting proceedings. (*g*)

II. MALICIOUS CONSPIRACY. To support this action the plaintiff must show—

1. An agreement to do an unlawful act.
2. A doing of the act in pursuance of the agreement.
3. Damage resulting to the plaintiff therefrom. (*h*)

(*f*) *Willans v. Taylor*, 6 Bing. 186.

(*g*) *Panton v. Williams*, 2 Q. B. 169; *Douglas v. Corbett*, 6 E. & B. 515; *Willans v. Taylor*, 6 Bing. 186.

(*h*) *Gregory v. Duke of Brunswick*, 6 M. & G. 205.

CHAPTER IV.

DEFAMATION OF CHARACTER.

I. **SLANDER** is the wilful and malicious publication of defamatory matter concerning another.

§ **MERE VITUPERATION** and abuse, however gross, is not actionable.

For example. To call a man “a scoundrel,” “a black-guard,” or “a rogue,” or to impute unchastity to a woman. (a)

Unless—

1. It is followed by special damage.

Illustration. Solomon published the following slander: “I can prove that John Davies’ wife had connection with a man named Labrach two years ago.” The Davieses brought an action against him, and laid as special damage, that the wife lost the companionship of, and ceased to receive the hospitality of, divers friends. It was held that the action would lie. (b)

[NOTE. *But the special damage must be the immediate and natural consequence of the words spoken.*

Illustration. Weeks said to Bryce, “Waud is a rogue and a swindler; I know enough about him to hang him.” Bryce communicated this to Bryer, who, in consequence, refused to sell Waud certain

(a) *Lynch v. Knight*, 9 H. & C. 577.

(b) *Davies v. Solomon*, L. R. 7 Q. B. 112.

goods upon credit. The court held that no action would lie, as an *unauthorized* communication cannot be considered the *necessary* consequence of the original uttering of the words, and the repetition was the voluntary act of a free agent. (c)

2. It imputes an indictable offence.

[NOTE. But if it *appear from the surrounding facts*, that the defendant did *not* intend to impute an actual crime, the slander will be mere "vulgar abuse," and no action will lie.

For example. Where the defendant in an action for slander said, "Thou art a thief, *for thou hast taken my beasts in execution.*" (d)]

3. It imputes that the plaintiff is afflicted with a contagious disorder (as the leprosy).

[For it causes him to be shunned by society.] (e)

4. It is spoken with reference to a man's trade or profession—

Illustration. Foulger was a gamekeeper, and it was his duty as such, and he had special instructions, not to trap foxes. Newcomb said of him, "It is no wonder we did not kill any foxes in Ridler's Wood, because Foulger trapped three foxes." The court held that the action would lie. (f)

II. **LIBEL** (*libellum*, a writing) is *written, printed, or symbolised*, slander.

§ All such publications, which are injurious to the private

(c) *Waud v. Weeks*, 7 Bing. 211 [see *post*, p. 248].

(d) *Wilks' case*, 1 Roll. Abr. 51.

(e) *Bloodworth v. Grey*, 7 M. & G. 334.

(f) *Foulger v. Newcomb*, L. R. 2 Ex. 327.

character or credit of another; *or* which hold him up to public hatred, ridicule, or contempt; *or* which tend to make him shunned or feared, are actionable. (a)

[NOTE. § Where anything defamatory is written, or printed, a more serious wrong is inflicted by reason of the wider and more lasting character of the publication, and also of the deliberation of the act, by which greater malice is indicated.

§ Libel is a crime, and is punishable as such; but, except in certain cases (see *post*, p. 258), it is otherwise with slander.

§ The original publisher of a slander, not actionable except upon proof of special damage, is only liable for such damage—

(i) If it is occasioned by his direct utterance.

(ii) If he has authorized the repetition.

(iii) If it was the *duty* of the person who heard it to repeat it.

And not if it was only caused by the *unauthorized* repetition of the slander by another. For in such cases the damage is too remote. (b)

§ But everyone who publishes, or republishes a *libel*, is responsible for his wrongful act. (c)]

OF DEFENCES TO ACTIONS FOR SLANDER AND LIBEL.

I. JUSTIFICATION. If the defendant can show that what he has said or written of the plaintiff is true in substance and in fact, the plaintiff cannot recover.

(a) It has been held that to write of a man "that he is an itchy old toad" is actionable. *Villers v. Monsley*, 2 Wils. 403.

(b) *Ward v. Weeks*, 7 Bing. 211 [see *ante*, p. 247].

(c) *Cook v. Ward*, 6 Bing. 115; *De Crespigny v. Wellesley*, 5 Bing. 403.

II. PRIVILEGED COMMUNICATIONS.

§ An action for defamation is founded on “*malice in law*.”

Malice in law is—

1. A wrongful act,
2. Done intentionally,
3. Without just cause or excuse. (*d*)

§ Malice in law is *implied* from the fact of the publication, and the element of spite, or *actual malice*, is not necessary to sustain an action. (*d*)

§ BUT THE INFERENCE OF THE EXISTENCE OF LEGAL MALICE MAY BE REBUTTED by evidence, showing that the occasion on which the slander or libel was published was a *privileged one*.

[In other words, shewing that one of the constituents of “malice in law,” viz. : that the wrongful act was done without just cause or excuse, was wanting.]

§ The Plaintiff, however, may still shew, that, although the occasion was a privileged one, the Defendant was really actuated by “*actual malice*,” or spite; in which case the defence of privilege is gone.

§ For the existence of “*actual malice*” destroys the privilege.

Illustration. Kynnersley dismissed his gardener, Fryer; and wrote to Eyles, the Superintendent of the Royal Horticultural Society, by whom Fryer had been originally recommended to him, stating his reasons for parting with him; and also describing a “scene” with Fryer in the garden, when he said Fryer came towards him with an open clasp-knife, “a perfect raving madman,” and “with his eyes starting out of their sockets with rage;” and gave other particulars in exaggerated language. In an action by Fryer, the Court held, that though

the occasion might have been privileged, the letter contained expressions which went beyond what was justifiable; and in itself shewed the existence of actual malice, which took away the privilege. (*a*)

§ In order, therefore, that an action for defamation may lie, if “legal malice” is rebutted, “actual malice,” must be proved.

§ **A PRIVILEGED OCCASION** is where the defamatory matter has been—

1. Published *bonâ fide*, and under the belief that it was true.

[**NOTE.** It is not necessary that there should be reasonable grounds for such belief. (*b*)]

- (i) In the discharge of some public or private duty, legal, moral, or social, where the interest of the public, or of the person communicated with, are concerned.

(*a*.) **Illustration.** Mrs. Affleck had a servant named Child. Child left her service, and got another place. Her new mistress wrote, after she had engaged Child, to Mrs. Affleck for Child’s character. Mrs. Affleck wrote saying that Child had, while in her service, conducted herself disgracefully, and was, she believed, then a prostitute at Bury. She also made a similar communication to the person who had

(*a*) *Fryer v. Kinnerley*, 33 L. J. C. P. 96.

(*b*) *Clark v. Molyneux*, 3 Q. B. D. 237, where BRAMWELL, L. J., observes that there may be cases where the privilege will protect a person who honestly makes a defamatory statement, *even where he does not believe it to be true*. It is suggested that such an occasion might be where there was a duty to make the communication at all events, as where a bishop might *bonâ fide* say to a rector in his diocese that he had heard certain grave charges against the rector’s curate which he was bound to communicate to him, but whether they were true or not he was unable to say.

originally recommended Child to her. In consequence of the letter, Child lost her place; and sued Mr. and Mrs. Affleck for libel in making both these communications. The court held that the occasions were both privileged. (c)

(β.) *Illustration.* Hawkins was paying his addresses to the widow of Dr. Taft. Her son in law, Mr. Todd, wrote her a letter warning her against Hawkins, and making imputations against his character. In an action by Hawkins against Todd, it was held that the occasion was privileged. (d)

(ii) In the conduct of the utterer's own affairs, where his own interests are concerned.

Illustration. The firm of Spill & Briggs was being wound up by Maule, a creditor of the firm. During the course of this business Maule wrote a letter to Messrs. Collin & Co., also creditors of the firm, in which, alluding to the partnership assets, he described Spill's conduct as "disgraceful and dishonest." In an action by Spill against Maule the court held the occasion privileged. (e)

(iii) Upon the request of the person of whom it is spoken.

Illustration. Hopwood was in partnership with Pinhorn at Southampton, as a linen-draper. The partnership was dissolved; and Hopwood became the minister of a

(c) *Child v. Affleck*, 9 B. & C. 403.

(d) *Hawkins v. Todd*, 8 C. & P. 88; and see *Coehead v. Richards*, 2 C. B. 605.

(e) *Spill v. Maule*, L. R. 4 Ex. 232.

dissenting chapel at Thatcham, near Newbury. Rumours got about, prejudicial to his character with reference to his transactions with Pinhorn: and Hopwood from the pulpit in the chapel demanded an investigation. An investigation was accordingly instituted; and Thorn, who was pastor of a congregational body at Winchester, was appointed to act at the inquiry on behalf of the member of Hopwood's Congregation, who had raised the charge; and one Ainslie was appointed by Hopwood to act for him. After the inquiry was held, but before the whole matter was disposed of, Thorn, in answer to a communication by Ainslie, wrote to him upon the subject, commenting in strong language on Hopwood's conduct, and stating that it appeared that Hopwood had cheated Pinhorn out of £2,000. In an action by Hopwood against Thorn, the court held, that the occasion was privileged. (a)

2. Where the defamatory matter is published by a newspaper, and is

- (i) A fair and impartial account, of what has happened in an open court of justice.

Illustration. Three gentlemen, civil engineers, applied under the Master and Servants Act to a police magistrate in London, for a summons against Mr. Usil, for improperly withholding certain moneys, which they alleged he had received, and

(a) *Hopwood v. Thorn*, 8 C. B. 316.

were due to them. The magistrate said it was a case for a county court, and not for criminal proceedings, and refused the summons. A report of the case was published in "The Daily News," "The Morning Advertiser," and the "Standard," newspapers. In three actions against all three papers for libel, brought by Mr. Usil, the jury found that the report was a fair and impartial one: and the court held, the occasion to have been privileged. (b)

- (ii) A fair and impartial account of what has happened at a debate in the High Court of Parliament.

Illustration. On February 13, 1867, "The Times" gave a report of a debate which occurred in the House of Lords on the previous evening. The report said that the debate arose on the presentation by Lord Russell of a petition of Mr. Wason, which made certain scandalous charges against the lately appointed Lord Chief Baron. That on presenting the petition, Lord Russell said that he should not ask the House to assent to the prayer of the petition, as he did not concur in it; and said that Mr. Wason's statement must be a fabrication. That the Lord Chancellor used stronger language, and concluded by saying that this petition would now lie on the table, a perpetual record of Wason's falsehood and malignity, and that Lord Derby said, that the House would only

(b) *Usil v. Hales*, 3 C. P. D. 319.

be doing its duty, and supporting its own dignity and character by refusing to allow so slanderous, calumnious, and unfounded a statement to be on the table. In an action against "The Times" by Wason, the jury found that the report was fair and reasonable, and the court held that the occasion was privileged. (a)

- (iii) A fair and impartial criticism of a person's conduct in matters of *public interest*. (b)

Illustration. The "Liverpool Daily Courier" published a correspondence between the Rev. Mr. Kelly, incumbent of St. George's Church, Liverpool, and his churchwardens; and also letters from other correspondents, and commented severely on Mr. Kelly's conduct. The correspondence related to an alleged desecration of the church by Mr. Kelly in permitting books to be sold therein, and the vestry to be used for cooking purposes. In an action by Mr. Kelly, the jury found that the matter complained of was within the reasonable limits of discussion; and the court held that the occasion was privileged. (c)

- (iv) A fair and impartial criticism of a book, or a work of art, or a public entertainment.

Illustration. Hood published a severe criticism on some books written by Sir John Carr, with a frontispiece consisting of a caricature of "The Knight leaving Ireland with regret." In an action by Sir John Carr,

(a) *Wason v. Walter*, L. R. 4 Q. B. 73.

(b) *Davis v. Duncan*, L. R. 9 C. P. 396.

(c) *Kelly v. Tinley*, L. R. 1 Q. B. 699.

it was held that a fair criticism was privileged, so long as it did not follow into domestic life for the purposes of personal slander. (*d*)

- (v) A comment made, without actual malice, on the public acts of men acting in a public capacity.

Illustration. Coupland published in the "Hampshire Advertiser," a series of libels on Parmiter, imputing to him partial and corrupt conduct, and ignorance of his duties *as Mayor and Justice of the Peace for the Borough of Winchester*. In an action by Parmiter it was held that every subject has the right to comment on those acts of public men which concern him as a subject of the realm, if he does not make his comment a cloak for malice and slander. (*e*)

3. Where the defamatory matter has been uttered in the course of a judicial proceeding by a judge, counsel, the jury, the parties, or a witness, the utterer is *absolutely* protected.

Illustration. Netherclift, an "expert" in the matter of handwriting, was witness, in the probate suit of *Davies v. May*, to prove that the signature to a will was a forgery. Subsequently he was witness in a police court, on a prosecution for forgery, to prove the genuineness of the document impugned. In cross-examination counsel read to him a report of the language of the judge of the Probate Court in the case of

(*d*) *Curr v. Hood*, in notis, 1 Camp. 354; *Soane v. Knight*, M. & M. 74.

(*e*) *Parmiter v. Coupland*, 6 M. & W. 108.

Davies *v.* May, strongly condemnatory of Netherclift's evidence, as being rash and overconfident. Upon which Netherclift volunteered the observation that "he believed the signature to that will to be a rank forgery, and should believe so till the day of his death." An action for slander was brought against him by Seaman, a solicitor, who in the probate suit had sworn that the signature to the will was genuine. But the court held that the defendant was absolutely privileged, *even though the plaintiff were to prove "malice in fact."* (a)

4. Where the defamatory matter is contained in a *bonâ fide* petition to the Queen, to parliament, or to ministers of state respecting the conduct of magistrates or officers. (b)
5. Where the defamatory matter is uttered without actual malice in the prosecution of an inquiry into a suspected crime.

Illustration. Hannah Podmore called at Lawrence's house. After she had left, Mrs. Lawrence missed a brooch. Lawrence then followed Podmore to an inn, and stated to her his suspicions in the presence of a third person. Afterwards Podmore consented to be searched by two females, to whom Lawrence repeated the charge. The brooch was afterwards discovered to have been left by Mrs. Lawrence in another place. In an action by Podmore the court held that the occasion was privileged. (c)

(a) *Seaman v. Netherclift*, 1 C. P. D. 544 ; 2 C. P. D. 53.
 (b) *Harrison v. Buck*, 5 E. & B. 344.
 (c) *Podmore v. Lawrence*, 11 Ad. & E. 382.

III. OF STATUTORY APOLOGIES.

1. *Any defendant* may give evidence, in *mitigation of damages*, of his having made or offered an apology—

- (i) Either before action ;
- (ii) Or as soon as possible after action, if the action was commenced before he had time to do so.

Provided, that he has with his statement of defence delivered to the plaintiff a notice of his intention to give such evidence. (*d*)

2. The defendant in an action for libel against a public newspaper, or other periodical publication, may make a good defence to such action—

- (i) By inserting in his own paper, at his earliest opportunity, an apology.

[Or, if his own paper is published less often than weekly, in some paper or periodical selected by the plaintiff.]

- (ii) By showing that the libel was published—

(*α.*) Without actual malice ; and

(*β.*) Without gross negligence, and

- (iii) By paying into court sufficient amends for the injury sustained by the plaintiff. (*e*)

§ QUESTIONS FOR THE JURY.

1. Whether there has been a publication of the libel.
2. Whether the defamatory matter is a libel. (*f*) That is to say, whether it really bears the meaning attributed to it.
3. Whether, (if it is a report, or criticism in a paper,) it is a fair comment.
4. Whether, (if the judge holds the occasion privileged,) it was published with actual malice.
5. Whether, (if justified,) it is true.

(*d*) 6 & 7 Vict. c. 96, s. 1.

(*e*) *Ibid*, s. 2.

(*f*) 32 Geo. 3, c. 60, s. 1.

6. Whether, (if money is paid into court) the sum so paid in is sufficient.

§ QUESTIONS FOR THE JUDGE.

1. Whether the alleged libel *is capable* of bearing the meaning ascribed to it. (a)
2. Whether the occasion is privileged. (b)

OF CRIMINAL PROCEEDINGS.

§ CRIMINAL PROCEEDINGS MAY BE TAKEN.

1. By indictment ;
2. By information, filed in the Queen's Bench, by leave of the court.

[This is a special remedy, which the Court of Queen's Bench, in its discretion, will allow; when it considers the case one of sufficient importance not to be left to be dealt with, in the usual way, by indictment.]

§ PUNISHMENT—

1. Where the publisher does *not know* the libel to be false ; Fine, or imprisonment not exceeding one year, or both. (c)
2. Where the publisher *knows* the libel to be false ; Fine, and imprisonment not exceeding two years. (d)

[*The crime is a misdemeanor, not triable at quarter sessions.*]

§ An indictment will only lie for libel, and not for slander.

Except—

1. Where it is seditious ;
 2. Where it is blasphemous ; (e)
 3. Where it directly tends to a breach of the peace ; (f)
- [As a challenge to fight a duel.]

(a) *Sturt v. Blogg*, 10 Q. B. 908.

(b) *Cooke v. Wildes*, 5 E. & B. 378.

(c) 6 & 7 Vict. c. 96, s. 4.

(d) *Ibid*, s. 5.

(e) *R. v. Taylor*, 3 Keb. 607.

(f) *R. v. Phillips*, 6 East 464.

4. Where uttered against, and in the presence of a magistrate in the execution of his office. (g)

§ DEFENCES—

1. The defendant may show that the libel is true;
Provided he also shews that it is *for the public benefit* that it should be published. (h)
- [NOTE. *At common law* it was no defence to show that the libel was true; and hence the maxim, “The greater the truth, the greater the libel.”]
2. The defendant may shew—
 - (i) That the publication was made without his authority, consent, or knowledge; and
 - (ii) That the publishing did not arise from want of due care, or caution, on his part. (i)

(g) *R. v. Pocock*, 2 St. 1,157; *Ex parte Duke of Marlborough*, 5 Q. B. 955; *R. v. Weltje*, 2 Camp. 242.

(h) 6 & 7 Vict. c. 96, s. 6.

(i) 6 & 7 Vict. c. 96, s. 7.

PART VI.

OF BREACHES OF DUTY IN RELATION TO THE PERSON.

CHAPTER I.

NEGLIGENT PERSONAL CONDUCT.

§ Where one by want of reasonable care in his own personal conduct causes damage to the person, or property (real or personal) of another, he is liable to compensate that other for the loss.

For example. If Jones were to hit out recklessly, right and left, with his fists, in a crowd, and so were to wound Smith, he would be liable to Smith for the injury.

§ PROFESSIONAL MEN AND SKILLED WORKMEN ARE BOUND TO USE—

1. Reasonable care.
2. Reasonable diligence.
3. A reasonable and competent degree of skill.

In proportion to the character of the work which each professes to undertake. (*a*)

[NOTE. *Contributory negligence.* The remarks on contributory negligence (*ante*, p. 221) apply equally to this chapter.]

(*a*) *Lanphier v. Phipps*, 8 C. & P. 479 ; *Seare v. Prentice*, 8 East. 352.

CHAPTER II.

OF FRAUDULENT REPRESENTATIONS.

§ A FRAUDULENT REPRESENTATION, for which an action will lie must be—

1. A false statement (*b*), which may be, either a
 - (i) *Suggestio falsi*; or a
 - (ii) *Suppressio veri*.
2. Made with a knowledge of its untruth. (*c*)

[Or (i) With no belief in its truth. (*d*)
Or (ii) In a reckless ignorance of its untruth. (*e*)
3. Made with the intention that another should act upon it. (*f*)
- [NOTE. But a bare lie, without any fraudulent intent, is not actionable. (*g*)]
4. Acted upon by that other.
5. Resulting, from being so acted on, in damage to that other. (*h*)

[NOTE. A person making a fraudulent representation will be liable, although he derives no benefit therefrom.

Illustration. Joseph Freeman represented to Messrs. Pasley and Edward that one Falch was a person safely to be trusted in order that Falch might obtain goods upon credit. There-

(*b*) *Ashlin v. White*, Holt, 387.

(*c*) *Ormrod v. Huth*, 14 M. & W. 651.

(*d*) *Taylor v. Ashton*, 11 M. & W. 415.

(*e*) *Jarrett v. Kennedy*, 6 C. B. 319.

(*f*) *Thom v. Bigland*, 8 Ex. 725.

(*g*) *Behn v. Kemble*, 7 C. B. N. S. 260.

(*h*) *Forster v. Charles*, 7 Bing. 105.

upon Pasley and Edward supplied him with goods upon credit, and Falch being insolvent, they lost the value of their goods. Freeman knew all the while Falch's circumstances. But it was conceded that Freeman had no interest in Falch's obtaining the goods, and that he was not in collusion with Falch. In an action by Pasley and Edward, the court held that Freeman was liable to them for the value of the goods supplied to Falch. (a)]

§ WHERE A FRAUDULENT REPRESENTATION OR ASSURANCE IS MADE
AS TO A PERSON'S

1. Conduct.
2. Credit.
3. Ability.
4. Trade.
5. Dealings.

And made with the intent that such person may obtain—

- (i) Credit, or
- (ii) Money, or
- (iii) Goods upon credit.

It must, in order to render liable the person so making it, be—

- (a.) In writing, and
- (β.) Signed by the party to be charged therewith. (b)

[NOTE 1.

The representation may be *partly in writing* and *partly verbal*.

Provided that the party acting upon it is mainly influenced by the written part. (c)

Illustration. One Robert Case applied to Mrs. Wade to let him some furniture on hire. Mrs.

(a) *Pasley v. Freeman*, 3 T. R. 51.

(b) 9 Geo. 4, c. 14, s. 6.

(c) *Tatton v. Wade*, 18 C. B. 371.

Wade required a reference; and Case directed her to apply to Tatton. She applied to Tatton, who in answer wrote saying, "that she need have no apprehension of Case's honesty; that he held a very responsible situation, and there was nothing to fear." Subsequently, she had an interview with Tatton, and said, "If you, as a respectable person, assure me his (Case's) statement is correct, I shall close with him;" and Tatton replied, "You may do so with perfect safety." Case never paid the hire of the furniture, and some of it he removed, and the rest was distrained for rent. In an action by Wade against Tatton, the court held that she was entitled to recover. (*d*)]

[NOTE 2.

The signature of an agent will not bind the principal

Illustration. Swift, being about to sell to Sir William Russell a quantity of rails, applied to his bankers for information as to Russell's solvency. They applied to Goddard, the manager of the Gloucestershire Banking Company, with whom Russell banked. Goddard, knowing Russell's affairs to be unsatisfactory, wrote a letter, leading Swift to believe that Russell was perfectly solvent. Swift thereupon supplied the rails, and lost his money. He then sued the Gloucestershire Banking Company for a fraudulent misrepresentation by Goddard, their agent. The court held that they were not liable. (*e*)

§ But as a general rule the principal is liable for the fraud

(*d*) *Tatton v. Wade*, 18 C. B. 371.

(*e*) *Swift v. Jewsbury*, L. R. 9 Q. B. 312.

of his agent, *when he retains the benefit of the agent's fraud.* (a)]

§ A PERSON MAKING A FRAUDULENT REPRESENTATION WILL BE LIABLE, ALTHOUGH HE DID NOT MAKE IT DIRECTLY TO THE PERSON INJURED.

Illustration. Levy, a gunsmith, fraudulently representing that a certain gun was made by Nock, and was a good, safe, and secure gun, sold it to Langridge for the use of himself *and his sons*. One of the sons used it, and it burst, and injured him. In an action by him against Levy, it was held that he was entitled to recover; for it was immaterial that the representation was made through an intermediate person, as Levy intended the representation to be acted upon by all the persons for whose use the gun was purchased. (b)

§ THE MISREPRESENTATION MAY BE MADE AS WELL BY CONDUCT AS BY WORDS.

Illustration. The vendor of a house in South Audley Square being aware of a defect in the main wall, plastered it up, and papered it over: And it was held that, as he had expressly concealed the defect, the vendee might recover damages from him therefor. (c)

§ ONE WHO MAKES A FRAUDULENT REPRESENTATION TO THE PUBLIC, is liable to any one of the public, who is injured by acting directly upon it. (d)

Illustration. A prospectus of a company, called the "Overend & Gurney Co.," was prepared by the projectors. It contained misrepresentations of facts known to those who issued it. It also concealed the existence of a deed, which was material to be known,

(a) *Udell v. Atherton*, see *ante*, p. 72; and see *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259.

(b) *Langridge v. Lery*, 2 M. & W. 519; 4 M. & W. 337.

(c) *Anon*, see *Pickering v. Dowson*, 4 Taunt., p. 785.

(d) *Scott v. Dixon*, 29 L. J. Ex. 62, n.; *Gerhard v. Bates*, 2 E. & B. 476.

and which, if known, would in all probability have prevented the formation of the company. Being addressed to the public, anyone might take up the prospectus, and appropriate to himself its representations by applying for an allotment of shares. Peck, not an original allottee, purchased shares in the market; and upon the company being wound up, he was held liable as a contributory. He claimed indemnity against the projectors on the ground of misrepresentation. It was held that, *though an original allottee could have maintained the claim*, when the allotment was completed, the office of the prospectus was at an end; and a subsequent purchaser of shares in the market, was not so connected with the prospectus as to render those, who had issued it, liable to indemnify him. (e)

§ BY THE COMPANIES ACT, 1867, A PROSPECTUS IS TO BE DEEMED FRAUDULENT ON THE PART OF

1. The promoters,
2. The directors,
3. The officers,

Of a limited company, as regards all persons taking shares upon the faith of it, without notice of fraud,

Unless it specifies the dates, and names of the parties, to any contracts, entered into by the company, its directors, promoters, or trustees, before the issue of such prospectus. (f)

COUNTERFEITING TRADEMARKS.

§ Where a trademark has been adopted by a particular manufacturer, and it has become known in the trade, and to the public as designating his goods; if another sells his own goods with a similar mark upon them, with intent to deceive purchasers, he will be liable.

(e) *Peck v. Gurney*, L. R. 6 H. L. 377.

(f) 30 & 31 Vict. c. 131, s. 38.

1. To the purchaser for a fraudulent misrepresentation ; (a)
2. To the manufacturer for injuring his sales ; and his reputation, if an inferior article is sold under his mark. (b)

[NOTE. § A right to a trademark precludes no one from making the same article ; but only from using the same designation for it. (c)

§ The object is to secure to the trader the benefit of his reputation ; and to protect the public from fraud on the part of rival traders.

§ Long use is not necessary for the acquirement of a right to a trademark ; but the article must have been brought into, and become known in the market by the trademark.

Illustration. Ford was a shirt maker in London, and invented a shape of shirt, which he called "The Eureka Shirt," and used as a trademark the words "Ford's Eureka Shirt." Foster subsequently sold shirts, which he called "Foster, Porter, & Co.'s improved Eureka shirt ;" and Ford applied for an injunction to restrain him from so doing. The injunction was granted. (d)

§ But when a name, used as a trademark, has come into such general use that it no longer has the effect of inducing the public to believe they are buying goods manufactured by the original adopter of the trademark, the

(a) *Anon*, cited in *Southern v. Howe*, Cro. Jac. 471.

(b) *Rodgers v. Nowill*, 5 C. B. 127 ; see also 25 & 26 Vict. c. 88, s. 22.

(c) *Farina v. Silverlock*, 6 De G. M. & G. 218.

(d) *Ford v. Foster*, L. R. 7 Ch. 613.

name becomes *publici juris*; and no right to its exclusive use can be maintained.

For example, "Broughams," "Wellington boots," "Harvey's sauce," or "Liebeg's extract of meat." (e)

§ The remedy is by action, or injunction.

§ The selling of an article with a trade mark is a selling with a warranty that the trade mark is genuine. (f)

§ The selling of an article, whereon is a statement as to the number, quantity, measure, or weight, thereof, is a selling with a warranty that such statement is true. (g)]

(e) *Liebeg's Extract of Meat Company v. Hanbury*, 17 L. T. N. S. 298; *Ford v. Foster*, L. R. 7 Ch. p. 628.

(f) 25 & 26 Vict. c. 88, s. 19.

(g) *Ibid*, s. 20.

PART VII.

INJURIES RESULTING FROM THE EXERCISE OF
STATUTORY POWERS.

§ AN ACTION WILL NOT LIE WHERE DAMAGE HAS BEEN CAUSED BY
AN ACT DONE UNDER POWERS GIVEN BY AN ACT OF PAR-
LIAMENT.

Provided—

1. The power has been exercised with judgment and caution.

Illustration. The G. N. Railway Co. constructed an embankment, in conformity with its Act, across some low lands, lying between the river Dun and some land belonging to Lawrence. The low lands were separated from Lawrence's land by a bank; but in consequence of the erection of the railway embankment, the flood waters were unable to spread over the low lands as formerly, and flowed over the bank, and on to Lawrence's land. In an action by Lawrence against the company, it was held, that if the company had used proper caution, they would have opened proper flood-gates to allow the flood water to escape, and were therefore not protected by the Act. (a)

2. The power has been strictly pursued, and not exceeded.

Illustration. The Festiniog Railway Company

a) *Lawrence v. Great Northern Railway Company*, 16 Q. B. 653.

were empowered by statute to make and maintain a railway and tramroad for the passage of waggons, engines, and other carriages for the purpose of conveying minerals, &c. They used their lines as empowered, and also ran passenger trains drawn by locomotive steam-engines. They were guilty of no negligence, but a spark from one of their engines set on fire a haystack of Jones. Jones sued them for maintaining a nuisance; and the court held that they were not protected by their statute, and were liable at common law. (b)

3. A nuisance is not created.

Illustration. The Lewisham Board of Works poured sewage into two streams called "The Poole River" and "The County Bridge Stream," which flowed through the land of Cator. Cator sued the Board for fouling and polluting his waterecourse; and the Board justified their conduct under "The Metropolis Management Act, 1855," which gave them large powers for the purposes of draining and sewerage in their district. The court held that the act did not empower them to commit a nuisance on Cator's land. (c)

[NOTE. *But if the statute expressly contemplates the creation of a nuisance, no action will lie.*

Illustration. The Stockton and Darlington Railway Company were empowered by their act to make and work a railway parallel and adjacent to an ancient highway. In consequence of which the horses of persons using the highway

(b) *Jones v. The Festiniog Railway Company*, L. R. 3 Q. B. 733; *Brownlow v. Metropolitan Board*, 31 L. J. C. P. 140.

(c) *Cator v. The Lewisham Board of Works*, 5 B. & S. 115,

were frightened by the locomotives. The Company were indicted for a nuisance; and the court held that the legislature must be presumed to have known what the relative positions of the highway and the railroad would be, and had sanctioned the interference with the public convenience. (a)]

4. The act has not been done negligently.

Illustration. The St. Helens Canal and Railway Company under statutory powers constructed a canal across a public highway, and carried the highway over the canal by means of a swivel bridge. When the bridge was open the highway abutted on the open cut of the canal, which was wholly unfenced, and unlighted. A boatman opened the swivel bridge to let his boat pass through, and Thomas Manley, who was walking along the highway, fell into the canal at the unprotected spot, and was drowned. In an action by his widow under Lord Campbell's Act the court held that the company was liable. (b)

5. Every known means of avoiding the committing of an injury has been made use of.

Illustration. Vaughan had a wood near the line of the Taff Vale Railway Company, which was set on fire by a spark from one of the company's engines. In an action by Vaughan the company proved that every precaution had been taken, and every means adopted, which science could suggest to prevent the emission of sparks.

(a) *Rex v. Pease*, 4 B. & Ad. 30.

(b) *Manley v. St. Helens Canal and Railway Company*, 2 H. & N. 840.

The court held that this was an answer to the plaintiff's claim. (*c*)

§ NOTICE OF ACTION must generally be given before commencing a suit in respect of any tort committed in the exercise of statutory powers.

(*c*) *Vaughan v. Taff Vale Railway Company*, 5 H. & N. 679.

PART VIII.

OF THE RELATION OF MASTER AND SERVANT.

I. OF THE LIABILITY OF THE MASTER FOR THE WRONGFUL ACTS OF THE SERVANT.

§ THE MASTER IS LIABLE FOR ALL TORTS COMMITTED BY HIS SERVANT.

Provided

1. The servant is at the time acting in the execution of his master's business.

(i) *Illustration.* North was going on foot along a road in Southwark with a waggon and horses. Smith was riding, with his groom behind him, in the contrary direction. As the groom passed North, he touched his horse with the spur. The horse kicked out, and struck and injured North. In an action by North against Smith, it was held that Smith was liable for the act of his servant. (a)

(ii) *Illustration.* Ashton was a wine merchant in the Minories, who sent a clerk and a carman with a horse and cart to deliver wine at Blackheath. They delivered the wine, and received back some empty bottles: and it was then the duty of the carman to return to Ashton's offices, deliver the bottles, and take the horse and cart round to the stables. Instead of

(a) *North v. Smith*, 10 C. B. 572.

doing this, it being after business hours, the carman, at the request of the clerk, when he had crossed London Bridge, went to the City Road to the clerk's house; and thence to fetch a cask from the clerk's brother-in-law at Barnsbury. While on the way to Barnsbury they ran over Storey. In an action by Storey against Ashton it was held, that the latter was not liable, as the carman had practically started on a fresh journey on his own account; and was not acting in the course of his employment as a servant. (b)

2. He is, at the time, acting within the scope of his employment for purposes of his master.

(i) *Illustration.* The local board of Swindon had a sewage farm, of which Buchan was the manager. He had ample powers to manage the farm in the most beneficial way. A ditch divided the farm from the land of Lord Bolingbroke; and with the view of rendering the ditch more efficient for drainage purposes, Buchan committed a trespass on Lord Bolingbroke's land, pared away the bank of the ditch, and cut the underwood and trees on Lord Bolingbroke's side. In an action by Lord Bolingbroke against the Board, it was held that Buchan had not acted within the scope of his employment, and the Board was not liable. (c)

(ii) *Illustration.* McCleod was tenant to

(b) *Storey v. Ashton*, L. R. 4 Q. B. 476.

(c) *Lord Bolingbroke v. The Local Board of Swindon*, L. R. 9 C. P. 575.

McKenzie of a house in Scotland [where the tenant is, by law, liable to his landlord, if the premises are burnt down by the negligence of the tenant's servants.] McCleod's housemaid, finding she was unable to light the fire in one of the rooms, by reason of the chimney smoking, and thinking the mischief arose from an accumulation of soot, proceeded to clean the chimney by burning furze and straw in it; in consequence of which the house was burnt down. In an action by McKenzie against McCleod the court held that the servant's duty was to light the fire, and not clean the chimney; and that the defendant was not liable. (a)

[NOTE. *The master is not absolved by the fact that the servant was acting in disobedience to orders.*

Illustration. The London General Omnibus Company had given strict orders to its drivers not to hinder or annoy other omnibuses. The driver of one of its omnibuses, in Knightsbridge, wilfully drove across another omnibus belonging to Limpus, came into collision with, and overturned it. In an action by Limpus against the company it was held that the company was liable. (b)]

3. The master is not *obliged by law* to employ a particular person [as, for instance, a pilot]. (c)

(a) *McKenzie v. McCleod*, 10 Bing. 385.

(b) *Limpus v. General Omnibus Company*, 1 H. & C. 526.

(c) *Bennet v. Moita*, 7 Taunt. 258.

§ *Where a man employs a sub-contractor* to do work for him, he is not responsible for the negligence of the sub-contractor's servants. (d)

Provided—

1. The work is lawful.

Illustration. The Sheffield Gas Company contracted with Watson Brothers to make trenches along the streets of Sheffield, and lay down gas pipes. Watson Brothers accordingly carried out the work, and in doing so carelessly left a heap of stones and earth on the footway, over which Jane Ellis fell and broke her arm. Neither the company nor Watson Brothers had any legal excuse or authority for breaking up the road, and the heap was in fact a public nuisance. In an action by Ellis against the company, the Court held that they were liable. (e)

2. He does not intermeddle himself.

Illustration. Gray employed Palmer to construct a drain from certain premises to the main sewer in the street, and applied, himself, to the local authority for leave to break up the road. Palmer's servants left a heap of gravel by the side of the road. On complaint made by a constable to Gray, the latter said he would remove it as soon as he could; and Palmer employed a man to cart away a portion of the gravel, and charged the expense to Gray. Burgess, who was driving along the road, drove over the heap, and was thrown out of his cart and injured.

(d) *Readie v. London and North Western Railway Company*, 4 Ex. 344.

(e) *Ellis v. Sheffield Gas Company*, 2 E. & B. 767.

In a second interview with the constable, Gray said he could produce evidence to show that the accident occurred through Burgess' own carelessness. In an action by Burgess against Gray, it was held that there was evidence that Gray had not abandoned the entire control of the work to Palmer, and that he was liable. (a)

3. The work is not such, that if done improperly, damage must *necessarily be expected* to result from it.

Illustration. Bower and Peate owned two adjoining houses, and Bower was entitled to have his house supported by Peate's land. Peate employed a contractor to pull down and rebuild his house, and to excavate the foundation; who by not sufficiently shoring up the earth, caused a settlement, which injured Bower's house. In an action by Bower against Peate, the court held that it was no defence for Peate to say that he had engaged a competent contractor to do the work, as a man is bound himself to see to the doing of what is necessary to prevent mischief, where in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted to prevent them. (b)

[NOTE. § Where the injury arises *directly* from the act contracted to be done, the contractor is liable.

§ But where it arises from something *collateral* to the act contracted to be done,

(a) *Burgess v. Gray*, 1 C. B. 578.

(b) *Bower v. Peate*, 1 Q. B. D. 321.

the contractee who employs him is liable. (c)]

II. OF THE LIABILITY OF THE MASTER TO THE SERVANT FOR NEGLIGENCE.

§ A master is bound to take all reasonable precautions for the safety of his servant. (d)

§ A master will be liable for all injuries happening to the servant in the course of the employment,

1. By reason of the master's negligence.

Illustration. Roberts was a bricklayer in the employment of Smith. Smith had a scaffold put up, which was to his knowledge composed of rotten timbers. He sent Roberts to work on the scaffold, which gave way; and Roberts was thrown to the ground and injured. In an action by Roberts it was held that there was evidence to go to the jury of negligence on the part of Smith, which would make him liable for the injuries happening to the plaintiff. (e)

2. By reason of a failure to provide the protection enjoined by an Act of parliament.

Illustration. Clarke was a cotton-spinner at Manchester. Holmes was his under overlooker, and it was his duty to oil certain machinery, which Clarke was bound, under the Factory Acts, properly to fence. When Holmes entered Clarke's service, the mill-gearing was fenced by an iron guard; but subsequently this was broken, and had not been mended, though Clarke had promised Holmes that the repairs should be done. Whilst Holmes was oiling the machinery, his arm was caught by the machine, and torn off. In an action by

(c) *Hole v. Sittingbourne and Sheerness Railway Company*, 30 L. J. Ex. 81.

(d) *Williams v. Clough*, 3 H. & N. 258.

(e) *Roberts v. Smith*, 2 H. & N. 213.

him against his master, the latter was held to be liable. (a)

3. By reason of a failure to disclose any latent danger in the employment.

Illustration. England was a contractor for the supply of beef for the use of the Royal Navy, and employed Davies to cut up certain carcasses, which he knew to be diseased and putrefying. Davies' hand became poisoned during the operation; in consequence of which he brought an action against England, and the court held that the latter was liable. (b)

Unless—

- (i) The servant has been guilty of contributory negligence. [See *ante*, p. 221.]
- (ii) The servant was acquainted with the danger, and took the employment with the attendant risks.

Illustration. Woodley was at work on a side wall in a dark tunnel of the Metropolitan District Railway. There was just room for him to do his work between the wall and the trains, which passed every ten minutes. While reaching across the rail for a tool he had laid down, a train knocked him over, and injured him. In an action brought by him against the company, it was held that he could not recover; as a man, entering a dangerous employment, takes it with the accompanying risks. (c)

- (iii) The injury has been caused by the negligence of a fellow servant— (d)

(a) *Holmes v. Clarke*, 31 L. J. Ex. 356.

(b) *Davies v. England*, 33 L. J. Q. B. 321.

(c) *Woodley v. Metropolitan District Railway Company*, 2 Ex D. 384.

(d) The Government has this session (May, 1880) brought in a Bill to

(a) Engaged in a common service.

Illustration. Fox and Henderson contracted with the Crystal Palace Company to erect a tower. They manufactured the materials, and entered into a sub-contract with one Moss, to do certain hoisting and fixing of the materials, Fox and Henderson supplying the scaffolding, and paying Moss' workmen by the week. Moss employed Wiggett to work at the bottom of the tower, and while he was so doing, some of Fox and Henderson's men at the top of the tower, dropped an instrument called a "rymer" on to Wiggett's head, and killed him. In an action by his widow, under Lord Campbell's Act, against Fox and Henderson, the court held that she could not recover, as her husband's death had been caused by the negligence of fellow workmen in a common employment. (e)

(3.) In the same work.

Illustration. Reid, a miner in the employment of the Bartonshill Coal Company, was in a "cage" for the purpose of ascending the shaft of a mine, and was drawn up by Shearer, also in the company's employ. Shearer failed to stop the cage in time, so that

modify the existing law on this point, with a view to make the employer liable to a servant who has been injured through the negligence of another servant, whose orders he is bound to obey.

(e) *Wiggett v. Fox*, 11 Ex. 832.

on its reaching the platform, it struck the scaffolding, and was overturned, and Reid fell to the bottom of the shaft and was killed. In an action by his widow, under Lord Campbell's Act, the House of Lords held that she could not recover, as both Reid and Shearer were engaged in the common object of bringing up the coal of their common employer to the surface. (a)

(7.) Who has been selected by the master with reasonable care. (b)

[NOTE. *One who voluntarily assists the servants of another*, and thereby gets injured through their negligence, is in the same position as a fellow servant for the time being.

Illustration. James Degg, in the employment of Pickford & Co., was unloading a truck on a siding at the Cheltenham Station of the Midland Railway. Close by was a turn-table, at which three servants of the Company were attempting to turn another truck. Degg left his work, and proceeded to help the three men at the turn-table; and while pushing with them, an engine was backed by another of the Company's servants against the truck, and crushed Degg's head between the buffer of the truck and the wall. In an action by his widow, under Lord Campbell's Act, the court held that she was unable to recover. (c)

(a) *Bartonhill Coal Company v. Reid*, 3 Macq. 296.

(b) *Tarrant v. Webb*, 18 C. B. 804.

(c) *Degg v. Midland Railway Company*, 1 H. & N. 773.

III. OF THE MASTER'S RIGHT OF ACTION IN RESPECT OF TORTS COMMITTED AGAINST HIS SERVANT.

§ They are liable to the master in damages who wilfully interrupt the relation subsisting between master and servant, whereby the master suffers loss.

1. By procuring the servant to depart from the master's service.

Illustration. Lumley was lessee and manager of the Queen's Theatre, and had engaged Johanna Wagner as a dramatic artiste to perform at his theatre for a certain time, and during that time not to sing elsewhere. Gye induced her to break her engagement, and to enter his employment; and Lumley sued Gye for enticing her away. The court held that the action would lie. (*d*)

2. By a personal injury whereby the master is deprived of the services of the servant.

Illustration. Frederick Berringer, an infant, travelled by the Tilbury and Southend Railway from Fenchurch Street to Stepney Junction, where the train came into collision with a train belonging to the Great Eastern Railway, through the negligence of the latter company. Frederick Berringer was injured, and his father sued the Great Eastern Railway for the loss of his son's services. [See *post*.] It was held that he was entitled to maintain the action. (*e*)

Provided that the injury to the servant is the result of a pure tort; and does not arise out of a breach of contract.

(*d*) *Lumley v. Gye*, 2 E. & B. 224; *Evans v. Walton*, L. R. 2 C. P. 615.

(*e*) *Berringer v. Great Eastern Railway Company*, 4 C. P. D. 163; *Gray v. Jefferies*, Cro. Eliz. 55.

Illustration. Alton, whose servant, Baxter, was injured when travelling on the Midland Railway, sued the company for the loss of Baxter's services, resulting from the company's breach of their contract to carry Baxter safely and securely. The court held that Alton could not recover, as there had been no contract between him and the company; and the company had been guilty of no breach of duty towards Alton, but only towards Baxter, who was no party to the action. (a)

3. By the seduction of a female servant [for by reason of her pregnancy, the master loses the benefit of her services.]

[NOTE. Theoretically a parent has a legal right to the services of his child, and if this relation is interfered with by reason of a daughter's pregnancy, he will be entitled to bring an action for damages against the seducer.

Provided—

- (i) The daughter was living with the father at *the time of the seduction*. (b)
 - (ii) Some service is proved, however nominal, [such as making his tea in the morning, or milking his cows. (c)]
 - (iii) The seduction has resulted in pregnancy. (d)
- § But though the gist of the action is loss of service, the parent in an action for the seduction of his daughter may recover

(a) *Alton v. Midland Railway Company*, 34 L. J. C. P. 292.

(b) *Davies v. Williams*, 10 Q. B. 728.

(c) *Thompson v. Ross*, 5 H. & N. 16; *Bennett v. Alcott*, 2 T. R. 168.

(d) *Eager v. Grimwood*, 1 Ex. 61.

damages for the injury his feelings have sustained. (e)

- § If the child is incapable by reason of its tender years, from performing any service, the parent cannot maintain an action.

Illustration. Hollander drove against, and injured Hall's child. In an action by the father against Hollander, it was proved that the child was only $2\frac{1}{2}$ years old, and the court held that the action would not lie, as by reason of the child's age no service could be presumed. (f)]

- § The master may, if he please, waive the tort, and sue in contract for the wages earned *by an apprentice* from the person who has enticed him away. (g)

IV. OF THE DOMINION OF PARENTS OVER THEIR CHILDREN.

- § A FATHER has, at common law, the exclusive right to the custody of his legitimate children from birth to the age of 21. (h)

- § THE CHILDREN may, however, *on attaining the age of sixteen*, choose for themselves with whom, and where, they will live. (i)

- § THE MOTHER has at common law no right to the custody of her children, however young, as against the father.

Illustration. De Manneville, a Frenchman, married an Englishwoman, and had by her one child. Shortly after the birth of the child she separated from her husband on account of his ill treatment of her, and took the child with her, which she was nursing at the breast. When the child was eight months old, the father got into the house where she was

(e) *Elliot v. Nicklin*, 5 Price, 641.

(f) *Hall v. Hollander*, 4 B. & C. 660.

(g) *Foster v. Stewart*, 3 M. & Sel. 191.

(h) *Cartledge v. Cartledge*, 31 L. J. P. & M. 85.

(i) *Ryder v. Ryder*, 30 L. J. P. & M. 44.

forcibly took the child from her breast, and removed it, half naked, in an open carriage. The mother obtained a writ of *habeas corpus*, directing her husband to produce the child in court, with a view to its restoration to herself. But the court held that they had no power to deprive the father of his right to the custody of the infant, in the absence of any ground for believing that such custody would be prejudicial to the child's health or liberty. (a)

[NOTE. But if the father is dead, or convicted of felony, the court will grant the mother a writ of *habeas corpus*, to give her the custody of her child up to the age of sixteen. (b)]

§ THE COURT will compel the mother, or any other person, to restore children to the custody of the father.

Unless—

1. He is guilty of, or it is apprehended that he will be guilty of, gross cruelty to his child ; (c)
2. The infant is of an age to elect for himself ; (d)
3. The father's conduct is such, that it is essential for the child's safety and welfare, physical, intellectual, or moral that his right should be suspended. (e)

Illustration. Alfred Goldsworthy applied to the Queen's Bench for a writ of *habeas corpus* to his wife and her father for the production before the court of his infant son Alfred Ernest, in order that he might be restored to the custody of his father, Mrs.

(a) *Rex v. De Manneville*, 5 East, 221.

(b) *Ex parte Bailey*, 6 Dowl. P. C. 311 ; and see also "The Custody of Infants Act," *post*, p. 285.

(c) *Re Andrews*, L. R. 8 Q. B. 158.

(d) *Rex v. Delaval*, 3 Burr 1435.

(e) *Ex parte Flynn*, 2 De G. & Sm. 474 ; *Re Curtis*, 28 L. J. Ch. 458.

Goldsworthy having left her home and taken her child with her. Mrs. Goldsworthy resisted the application on the ground that her husband was constantly intoxicated, and habitually made use of filthy and disgusting language to her in the presence of her son, who had learnt much of the bad language from the father. The court refused the writ on the ground that the elementary morals of the child were in serious danger from the father's misconduct. (*f*)

[NOTE. But the court is always reluctant to interfere with the rights of the father. (*g*)]

§ THE COURT may, in its discretion, on the application of the mother, order that she may have—

1. Access to her child at such times as the Court may deem fit;
2. The custody of the child up to the age of sixteen, or to such age as the Court may think proper. (*h*)

§ THE COURT OF DIVORCE may, where there has been a decree absolute for a judicial separation, or for nullity, or dissolution, of marriage, make such order as it may think just and proper for the custody, maintenance, and education of children of the marriage dealt with by the Court. (*i*)

§ But the Divorce Court will not interfere with the father's common law right to the custody of the children—
Unless he is leading a notoriously dissolute life. (*k*)

(*f*) *Re Goldsworthy*, 2 Q. B. D. 75.

(*g*) *Hope v. Hope*, 23 L. J. Ch. 689.

(*h*) "The Custody of Infants Act, 1873," 36 Vict. c. 12, s. 1.

(*i*) 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4.

(*k*) *March v. March*, L. R. 1 P. & M. 437.

§ A TESTAMENTARY GUARDIAN has the same right to the custody of his infant ward as the father would have had. (a)

[NOTE. § A father may by will appoint a guardian to his infant legitimate child. (b)

§ A mother has no power to appoint a guardian even to her own illegitimate child. (c)]

§ THE RELIGIOUS BELIEF OF THE FATHER must be scrupulously regarded by the guardians of the children of the dead man. (d)

§ THE COURT WILL RESTRAIN all persons from bringing up such children in any other belief.

Unless—

1. *In cases where the father is dead*, such a permanent impression of another faith has been made on the child, that it would be injurious to the child's welfare by unsettling its belief. (e)
2. The father has abandoned his right to educate the child in his own religion. (f)

[In which case the Court will only consider the happiness and benefit of the child.]

§ ANY AGREEMENT BETWEEN HUSBAND AND WIFE THAT CHILDREN SHALL BE BROUGHT UP IN ANY FAITH OTHER THAN THAT OF THE FATHER IS VOID.

Illustration. The Hon. Leopold Agar-Ellis, a Protestant, married a Roman Catholic lady. Before marriage he agreed that all the children should be brought up Roman Catholics. Shortly after the birth of the first

(a) *Re Andrews*, L. R. 8 Q. B. 153.

(b) 12 Carl. 2, c. 24, s. 8.

(c) *Ex parte Edwards*, 3 Atk. 519; *Ex parte Glover*, 4 D. P. C. 291.

(d) *Hawksworth v. Hawksworth*, L. R. 6 Ch. 542.

(e) *Stourton v. Stourton*, 8 D. M. & G. 760; *Agar-Ellis v. Lascelles*, 27 W. R.

(f) *Andrews v. Salt*, L. R. 8 Ch. 639.

child, he retracted his promise, and directed his wife to have the children educated as Protestants. The wife, unknown to the father, took the children to confession and Roman Catholic services, and imbued their minds with such distinctive Roman doctrines that the three children, aged 12, 11, and 9, respectively, refused to accompany their father to Protestant churches. Upon the father proceeding to send the children from home to be educated by a Protestant clergyman, the mother, who was at this time separated from her husband, petitioned to have the custody of the infants, under the "Infants' Custody Act, 1873." The Court dismissed the petition. (g)

(g) *Agar-Ellis v. Lascelles*, 27 W. R. 117.



BOOK IV.

DAMAGES.

§ **DAMAGES.** A compensation and a satisfaction for a loss or injury sustained.

§ **THE MOTIVE** of the person causing the loss or injury cannot be taken into account by the jury.

§ **EXCEPT** in the cases of malicious injuries, and trespasses, accompanied by insulting, cruel, or wanton conduct, and then

§ **EXEMPLARY DAMAGES** may be given, which are in the nature of a punishment, intended to have a deterrent effect.

Illustration. Merest was out shooting on his own manor, when Harvey, a banker, a magistrate, and a M.P. drove up in his carriage, and vowed he would join Merest's party. Merest gave him distinct notice not to do so; but Harvey fired several times on Merest's land at Merest's birds, and proposed to borrow shot of Merest, when his own was expended. He used very intemperate language, and threatened to commit Merest, and defied him to bring an action. Merest sued him, and recovered £500, and the Court held the verdict to be a proper one, and the damages not excessive. (a)

(a) *Merest v. Harvey*, 5 Taunt. 443.

I. **NOMINAL DAMAGE** is an insignificant amount recovered, when the law presumes damage, although the jury find that the plaintiff has suffered no appreciable loss;

1. Where there has been a bare breach of contract;
2. Where there has been a bare infringement of a right.

II. **ACTUAL DAMAGE** is where the jury can estimate the amount of loss which the plaintiff has suffered, and may be

1. *General damage*, viz., that which is the primary and immediate result of the defendant's misconduct, and this is,

(i) *In contracts*, that which may reasonably be considered as arising in the ordinary course of things from the breach of contract. (a)

For example—

(a.) If the plaintiff has lent the defendant money at interest, the damages will be the sum lent and the amount of interest unpaid.

(β.) If the defendant has agreed to sell goods to the plaintiff, and refuses to deliver them, the damages will be the difference between the *contract* price of the goods and the *market* price of goods of a similar description and quality at the time when the defendant should have given delivery. (b)

(γ.) If the plaintiff is suing for the non-repair of a house under a covenant, the damages will be such a sum as will put the house into such repair as is demanded by the covenant, regard being had to the length of the lease. (c)

(a) *Hadley v. Baxendale*, 9 Ex. 341.

(b) *Gainsford v. Carrol*, 2 B. & C. 624.

(c) *Doe d. Worcester School Trustees v. Rowland*, 9 C. & P. 734.

- (d.) If the defendant is a carrier, and loses the plaintiff's goods, the damages will be the value of the goods at the place and time where, and at which, they ought to have been delivered. (d)
- (e.) If the defendant is sued on a guarantie, the plaintiff will recover the amount due to him from the person he has trusted on the guarantie, with interest, if the debt bears interest. (e)
- (f.) If the plaintiff is suing for the breach of a warranty of a horse, he will recover such a sum as represents the difference between the actual value of the horse with the defect, and the value of which it would have been, had it had no defect. (f)
- (ii) *In torts* the direct loss, which in the ordinary course of things flows immediately from the original wrongful act. (g)

For example—

- (a.) If the tenant has committed waste by removing fixtures, the reversioner will recover the sum at which the fixtures would be valued between an outgoing and an incoming tenant. (h)
- (b.) In an action of trover for goods, the plaintiff would recover the value of the goods.
- (c.) If the defendant has negligently driven

(d) *Rice v. Baxendale*, 7 H. & N. 96.

(e) *Ackerman v. Fhrensperger*, 16 M. & W. 99.

(f) *Towers v. Barrett*, 1 T. R. 136.

(g) *Sharp v. Powell*, L. R. 7 C. P. 253.

(h) *Thompson v. Pettitt*, 10 Q. B. 105.

over and injured the plaintiff, the damages will be such a sum as the jury choose to consider sufficient to compensate him for his pain and suffering, and to pay for his doctor's bill. (a)

(d.) If the plaintiff is suing for a wrongful distress, he will be entitled to recover the value of the property distrained. (b)

(e.) If the plaintiff is suing for a libel, the damages will be such a sum as the jury may consider sufficient to compensate him for the injury done to his character. (c)

2—*Special damage*, viz., that, which would not arise except for the peculiar circumstances of the particular case.

(i) *Illustration.* Collard, a farmer in Kent, delivered to the South Eastern Railway Company eight pockets of hops to be carried to one Cozier in London, to whom he had contracted to sell them. The Company delayed them nine days, and eventually delivered them, at the Bricklayer's Arms Station, in an open truck, stained, and wetted. Cozier, thereupon, refused the hops; and Collard had to dry them; (a process which required a week;) and then to sell them for the best price they would fetch. The market price had in the mean time dropped from £18 to £9 per cwt; and the hops themselves, being damaged, lost value to the amount of £3 or £4. In an action against the Com-

(a) *Blake v. Midland Railway Company*, 18 Q. B. 111.

(b) *Attack v. Bramwell*, 3 B. & S. 520.

(c) *Tripp v. Thomas*, 3 B. & C. 427.

pany by Collard, it was held that he was entitled to recover, not only for the damage done to the hops, but also special damage, in respect of the loss resulting from the fall in the market, during the time that the sale of the hops was delayed through the defendant's negligence. (d)

(ii) *Illustration.* Randall ordered, and bought of Newsom, a coachbuilder, a pole for his carriage. The pole broke in use; and the horses, becoming frightened in consequence, were injured. In an action by Randall the jury found that the pole was not reasonably fit for the carriage; but that Newsom had been guilty of no negligence. The Court held, that Newsom must be taken to have impliedly warranted the pole; and that Randall was entitled to recover, not only the value of the pole, the immediate damage resulting from the breach of warranty; but also the difference between the value of the horses before and after the accident, as special damage. (e)

(iii) *Illustration.* France bought some champagne of Gaudet & Co., at 14s. per dozen; and resold it to the Captain of a ship, about to leave England, for 24s. per dozen. Gaudet & Co., (who had no notice of the sub-contract,) refused to deliver the wine; *and no similar wine being procurable in the market*, France was unable to fulfil his contract. He accordingly sued Gaudet & Co.; in trover for the wine. And the Court held, that he was

(d) *Collard v. South Eastern Railway Company*, 30 L. J. Ex. 393.

(e) *Randall v. Newsom*, 2 Q. B. D. 102.

entitled to recover, as special damage, not only the contract price of the wine, but the special value of the wine to him at the time that it should have been delivered, viz., 24s. per dozen. (a)

[NOTE. *Loss of profits* cannot be recovered in an action of *contract*, (b)]

Unless the profits to be made are the actual thing contracted for, as where a ship is hired for the purpose of earning freights. (c)]

(iv) *Illustration.* Benjamin kept a coffee-house in a narrow street near Covent Garden. Storr & Co. carried on business as auctioneers, on adjacent premises, which had an out-let close to Benjamin's house. Storr and Co.'s vans were constantly being unloaded in this out-let, and intercepted the light flowing on to Benjamin's windows, to such an extent as to oblige him to burn gas all day. In an action by Benjamin for the obstruction of his light, and for an injunction to restrain Storr & Co., it was held that the plaintiff could recover special damage in respect of the extra gas which he had been compelled to burn. (d)

(v) *Illustration.* Riding kept a draper's and grocer's shop, and was assisted by his wife in the business. Smith said in the presence of several persons that Mrs. Riding had been guilty of adultery with the new incumbent of a neighbouring church. Riding sued Smith for maliciously making this statement with reference

(a) *France v. Gaudet*, L. R. 6 Q. B. 199.

(b) *Williams v. Reynolds*, 34 L. J. Q. B. 221.

(c) *Cory v. Thames Ironworks Company*, L. R. 3 Q. B. 181.

(d) *Benjamin v. Storr*, L. R. 9 C. P. 407.

to his business, and proved as special damage that his trade had considerably fallen off. The Court held that he was entitled to recover the damage proved. (*e*)

(vi) *Illustration.* Mainwaring, a broker in London, received a commission from Gevers & Co., merchants in Holland, to purchase and ship from Porto Rico tobacco of the best quality. Mainwaring employed Brandon & Co. to execute the order, and Brandon & Co. bought and shipped a quantity of rotten and inferior tobacco, which Gevers & Co. refused to accept. Gevers & Co. sued Mainwaring for, and recovered from him, damages for the breach of contract. Mainwaring then sued Brandon & Co., and the Court held that he was entitled to recover, not only the damages he had had to pay Gevers & Co., but also the costs he had incurred in defending the action (*f*)

[NOTE. The costs of defending an action can only be recovered when,

(*a.*) They are the natural and proximate consequence of the breach of contract; (*g*)

(*β.*) They are such as a prudent and reasonable man would, under similar circumstances have incurred. (*h*)]

[§ PROSPECTIVE DAMAGES may be given by the jury in respect of consequences, which they believe will almost certainly happen. (*i*)]

(*e*) *Riding v. Smith*, 1 Ex. D. 91.

(*f*) *Mainwaring v. Brandon*, 2 Moore, 125.

(*g*) *Richardson v. Dunn*, 8 C. B. N. S. 655.

(*h*) *Broom v. Hall*, 7 C. B. N. S. 503.

(*i*) *Richardson v. Mellish*, 2 Bing. 240.

§ THE DAMAGES MUST NOT BE TOO REMOTELY CONNECTED WITH THE CAUSE OF ACTION.

§ IN ORDER NOT TO BE TOO REMOTE THEY MUST BE—

I. *In actions of contract*, damages, which may reasonably be supposed to have been *in the contemplation* of both parties at the time of entering into the contract, as the probable result of a breach of it.

Illustration. Hadley & Co., the owners of a flour mill, sent a broken iron shaft to Baxendales, the carriers, to be delivered to Joyce & Co. as a pattern, from which Joyce & Co. were to make a new shaft. At the time of leaving the shaft, they told Baxendales' clerk that the mill was stopped, and the shaft must be delivered immediately, but said nothing to lead him to suppose that the working of the mill depended on the expeditious despatch of the shaft. Baxendales did not deliver the shaft to Joyce & Co. for several days, and the making of the new shaft was thereby proportionately delayed. Hadley & Co. sued Baxendales for the loss of profits which they incurred through the mill being stopped. And the Court held that the damage was too remote. (a)

§ *The damage will have been in the contemplation of the parties.*

1. When the special circumstances of the case are known to them.

(i) *Illustration.* The British Columbia Saw Mill Company delivered to Nettleship several cases of machinery to be carried in his ship to Vancouver's Island, for the erection of a saw mill. On the arrival of the ship at Vancouver's Island, one of the cases, which contained certain portions, without which the mill could not be erected, and which could

(a) *Hadley v. Baxendale*, 9 Ex. 341.

not be replaced without sending to England, was missing, and the company sued Nettleship for the actual cost of replacing the machinery, and also for loss incurred by the stoppage of the works for the twelve months which elapsed before the lost machinery could be replaced. Nettleship only knew at the time he shipped the cases that they contained machinery, and was informed of nothing further. The Court held that the damage claimed for the stoppage of the works was too remote. (b)

- (ii) *Illustration.* Stuart's business was to collect telegraphic messages for transmission to America. Sanders & Co. entrusted him with a message in cypher, which was unintelligible to Stuart. He negligently omitted to send the message, in consequence of which Sanders & Co. lost a sum of money, which they would have earned for commission on an order, to which the message related. In an action by Sanders & Co. against Stuart, it was held, that they were only entitled to nominal damages. (c)

2. Where the damage flows naturally from the breach of contract *under those special circumstances.*

Illustration. Hobbs and wife and two children were passengers by the South Western Railway, from Wimbledon to Hampton Court, by the midnight train. The train instead of going to Hampton Court branched at Surbiton; and they were, therefore, obliged

(b) *British Columbia Saw Mill Company v. Nettleship*, L. R. 3 C. P. 499.

(c) *Sanders v. Stuart*, 1 C. P. D. 326.

to alight at Esher, some four or five miles from their destination. No conveyance could be got, and no accommodation at an inn; and they were all obliged to walk home. The night turned out a wet one, and the wife caught a severe cold, and was laid up for some time. They sued the Company for damages; and the jury gave them £8 for the inconvenience, to which they had been submitted; and £20 for the expenses in curing the wife. The Court held, that the verdict should stand for £8; but that as to the £20, the illness, and its consequences, were too remote. (a)

3. Where the special risk has been either expressly, or impliedly *assented* to by the party to be charged therewith.

Illustration. Horne & Co., shoe manufacturers, of Kettering, were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army, at 4s. a pair, an unusually high price. The shoes were to be delivered by Feb. 3rd, 1871, and Horne & Co. sent them in good time to the Midland Railway for carriage to London, with notice that the shoes would be thrown on their hands if not delivered by Feb. 3rd; but no notice was given that there was anything exceptional about the contract. The shoes were not delivered till Feb. 4th, and were rejected, and had to be sold for the market price of such shoes, viz., 2s. 9d. a

(a) *Hobbs v. London and South Western Railway Company*, L. R. 10 Q. B. 111.

pair. Horne & Co. then sued the company for the full value of the contract at 4s. per pair, less the amount realized on sale at 2s. 9d. per pair; and the company paid into court the sum of £20 to cover the expenses of the sale, and of the delivery to the ultimate purchaser. The Court held that the extra 1s. 3d. per pair could not be recovered, as, in the absence of something equivalent to a *contract on the defendant's part* to be liable for the extraordinary price, they could only be reasonably supposed to have had in their contemplation that the plaintiff's contract was to supply shoes at an ordinary price. (b)

II. *In actions of tort*, damages, which it was probable would, in the natural course of events, flow from the original wrongful act.

- (i) *Illustration*. Some workmen of the London & South Western Railway Company cut the grass and trimmed the hedges at the side of a portion of the line. They placed the cuttings in heaps, which, during the very dry weather, became so dry that some sparks from an engine set them on fire. The fire spread to the hedge, and burnt the hedge, and then across a stubble field, and over a road for some 200 yards, and set fire to Smith's cottage. In an action by Smith against the company, the Court held that the damages were not too remote, and the company were liable for all the consequences naturally resulting from their negligence, *whether they could have foreseen them or not*. (c)

(b) *Horne v. Midland Railway Company*, L. R. 8 C. P. 131.

(c) *Smith v. London and South Western Railway Company*, L. R. 6 C. P. 14.

(ii) *Illustration.* Felton gave Hoey (a cigar maker) into custody upon an unfounded charge. He was detained from 1.30 to 2.0, when he was set at liberty. At two o'clock Hoey had an appointment with a cigar manufacturer to consider the latter taking Hoey into his employment. But by reason of Felton's conduct, Hoey was unable to keep his appointment, and on attending the following morning found the place had been given to another. In an action by Hoey against Felton for false imprisonment, it was held that his claim for damage in respect of his loss of the engagement was too remote, for such damage does not in the common course of events follow from such a wrongful act as the defendant's, the act and the damage in such a case not being known by common experience to be in sequence. (a)

[Compare also the cases, ante, on special damage.]

§ THE ORIGINAL DOER OF A WRONGFUL ACT IS RESPONSIBLE FOR THE CONSEQUENCES OF THAT ACT.

Illustration. Shepherd threw a lighted squib from the street into a market house, where many people were assembled. It fell upon the stall of one Yates, who sold gingerbread. One Willis, to save Yates' goods, picked it up, and threw it across the market; where it fell on the stall of one Ryall, who to save his goods took it up, and threw it across the market house again. In this last flight it struck Scott in the face, burst, and put out one of his eyes. He sued Shepherd in trespass for the injury; and the Court held, that Shepherd, who had originally set the dangerous thing in motion, was liable, the injury to Scott being the

(a) *Hoey v. Felton*, 11 C. B. N. S. 146.

immediate consequence of Shepherd's wrongful act. (*b*)

§ DAMAGE WILL NOT BE TOO REMOTE, ALTHOUGH A THIRD PARTY HAS INTERVENED, AND IMMEDIATELY CAUSED THE INJURY.

Illustration. Chambers, who was the proprietor of certain athletic grounds at Lilly Bridge, illegally placed a barrier across a private road near his fence, to prevent persons from driving up to the fence, and looking over at the sports. Some person mischievously removed a portion of this barrier, which was covered with spikes, and set it up on the footpath by the side of the road. Clarke, who was coming along the footpath on a dark night, ran against the spikes, and injured his eye. In an action by Clarke against Chambers it was held, that the defendant was liable. (*c*)

§ INTEREST MAY BE RECOVERED.

1. On judgments in the Superior Courts, at the rate of four per cent. (*d*)
2. On negotiable instruments.
3. Where there is an *express*, or *implied* agreement to pay interest. (*e*)
4. Where a sum which can be ascertained by calculation (*f*) is payable,
 - (i) By virtue of a written instrument; and
 - (ii) At a certain time; or
 - (iii) By virtue of a demand for payment, in writing, with written notice that interest will be charged from the date of the demand. (*g*)

(*b*) *Scott v. Shepherd*, 2 Wm. Bl. 892.

(*c*) *Clarke v. Chambers*, 3 Q. B. D. 327.

(*d*) 1 & 2 Vict. c. 110, s. 17.

(*e*) *Ex parte Williams*, 1 Rose, 399.

(*f*) *Harper v. Williams*, 4 Q. B. 234.

(*g*) 3 & 4 Will. 4, c. 42, s. 28.

5. In actions of

- (i) Trover ;
- (ii) Trespass to goods ;
- (iii) On policies of insurance. (a)

[NOTE. It is in the discretion of the jury to give interest in cases 4, and 5. (b)]

OF LIQUIDATED DAMAGES AND PENALTIES.

§ **LIQUIDATED DAMAGES.** A sum agreed upon beforehand by the parties to a contract, as the ascertained satisfaction for its breach.

1. Where the consequences of the breach are altogether uncertain ;
2. Where the parties themselves can most correctly estimate the damage.

Illustration. Galsworthy and Strutt, solicitors, dissolved partnership, Strutt covenanting not to practise during the then next seven years, directly or indirectly, as solicitor or attorney within fifty miles of Ely Place, nor interfere with, solicit, or influence the clients of the late co-partnership ; and for a breach of such covenant to pay Galsworthy the sum of £1,000 liquidated damages. Strutt broke his covenant and practised in Westminster ; and, on Galsworthy suing him on the covenant, paid £50 into court as satisfaction for a penalty. The Court held that the sum of £1,000 was liquidated damages, for no man can say how much he may be injured by the loss of one of his clients. (c)

§ **A PENALTY** is a sum which one of the parties to a contract has bound himself to forfeit in the event of—

1. His failing to pay a much smaller sum ;

(a) 3 & 4 Will. 4, c. 42, s. 29.

(b) *Ibid.* ss. 28, 29.

(c) *Galsworthy v. Strutt*, 1 Ex. 663.

2. His failing to perform certain specified terms of the contract.

[NOTE. Cases of great hardship arose, where all the material terms of a contract were fulfilled, but some insignificant matter had been neglected, whereby the full penalty became forfeit. Whereupon the Court of Chancery was in the habit of interfering by injunction, upon the defendant's satisfying the plaintiff's substantial claim, to restrain the plaintiff, who had recovered a penalty at common law, from obtaining the fruits of his judgment.

Thereafter the legislature proceeded to give relief at common law, as follows.

1. In the case of *common money bonds* [where the bond is to become void on payment on a certain day of a certain less sum, and otherwise the larger penal sum to become forfeit.]
 - (i) If the principal and interest due were paid before action (though the bond was forfeit), a defence was given to the action.
 - (ii) If the principal and interest due were not paid before action, they might be paid into court, and the bond discharged. (*d*)
2. In the case of bonds, under which a penal sum is to be forfeit, upon failure to perform certain acts therein specified.
 - (i) The plaintiff is bound, in an action on the bond, "to assign breaches" (that is, to specify the defendant's acts, for which he claims forfeiture of the penalty).
 - (ii) The plaintiff may, if he pleases, pay money into court to meet the claim.
 - (iii) The jury, if sufficient money is not paid

into court, assess damages for those specific breaches, upon proof thereof; which damages alone can be recovered.

- (iv) Judgment is then entered up *for the full amount* of the penalty, as security for damages resulting from any subsequent breaches, which may be committed. (a)]

§ There is a great distinction between “a penalty,” and “liquidated damages.” In an action for the latter, the plaintiff recovers the entire sum stipulated for, whatever the actual amount of damage may be. In an action for the former the plaintiff only recovers such an amount, as a jury may think is a reasonable compensation for the injury sustained.

§ It is a question of law for the court, or a judge, to determine, whether a sum mentioned in a contract, as payable in the event of a breach thereof, is to be treated as liquidated damages, or as a penalty. (b)

§ It matters not, whether in the contract the sum payable is called “a penalty,” or “liquidated damages,” as the court will look to the meaning, and effect, of the contract itself, as disclosing the intention of the parties; irrespective of the term they have chosen to make use of. (c)

§ THE SPECIFIED SUM WILL BE DEEMED BY THE COURT TO BE A PENALTY WHERE—

1. (i) The payment of a smaller sum is secured by a larger one. (d)
- (ii) The performance of an act is secured by a certain sum, and in the same instrument a smaller penalty is attached to the non-performance of such act.

Illustration. Frances Weldon, an actress, agreed

(a) 8 & 9 Will. 3, c. 11, s. 8.

(b) *Sainter v. Ferguson*, 7 C. B. 727.

(c) *Ibid.*; and see *Penton v. Davies*, 6 B. & C. 224.

(d) Per CHAMBRE, J., in *Astley v. Weldon*, 2 B. & P. 354.

with Astley to play in his company for three years, at £1 11s. 6d. per week, and her travelling expenses; to attend all rehearsals; to attend the theatre, over hours, on emergencies; to submit to, and pay, all fines established in the theatres; and generally to conform to all rules. If either party neglected to perform the agreement, he or she should pay to the other £200. Frances Weldon broke her engagement, and refused to continue in Astley's company, and Astley sued her for the £200. The Court held that this sum was a penalty, and not liquidated damages; otherwise, if Weldon had refused to pay a small fine, or Astley had refused to pay one weekly sum of £1 11s. 6d. per week, the one in default would have been liable to pay the whole £200, which was in effect securing a smaller sum by a larger one. (e)

2. One sum is stated to be paid on the breach of any one of a number of stipulations of different degrees of importance. (f)

Illustration. Farren agreed with Kemble, the manager of Covent Garden Theatre, to play for four seasons as principal comedian, and in all things to conform to the regulations of the theatre. Kemble was to pay Farren £3 6s. 8d. per night, and Farren was to have one benefit night in each season, on certain specified terms. The agreement also contained a clause, that if either should neglect or refuse to fulfil the agreement, *or any part thereof, or any stipulation therein contained*, each party should pay to the other £1,000 as liquidated damages, and not

(e) *Ibid.* p. 346.

(f) Per Lord COLERIDGE, L. C. J., in *Magee v. Lavell*, L. R. 9 C. P. 111.

as a penalty. Farren refused to act during the second season, and Kemble sued him for the £1,000. The jury gave him a verdict for £750, which was subject to a motion for increasing the damages to £1,000, if the Court should be of opinion that the sum mentioned was not a penalty. It was held that the £1,000 was a penalty, and not liquidated damages, as, otherwise, the full sum would have been payable if the plaintiff had omitted to pay the defendant one sum of £3 6s. 8d., or *the defendant had refused to conform to some unusual regulation of the theatre.* (a)

(a) *Kemble v. Farren*, 6 Bing. 141.

APPENDIX.

29 CARL. II., CAP. 3.

AN ACT for Prevention of Frauds and Perjuries.

FOR prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and the Commons, in this present parliament assembled, and by the authority of the same, that, from and after the four and twentieth day of June which shall be in the year of our Lord one thousand six hundred seventy and seven, all leases, estates, interests of freehold, or terms of years, or any uncertain interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

Parol leases and interests of freehold shall have the force of estates at will only ;

II. Except nevertheless all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at least of the full improved value of the thing demised.

except leases not exceeding three years, &c.

III. And moreover, that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall at any time after the said four and twentieth day of June be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by Act and operation of law.

No leases or estates of freehold shall be granted or surrendered by word.

IV. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no action shall be

Promises and agreements by parol.

brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sale of land, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Contracts for
sales of goods
for ten pounds
or more.

XVII. And be it further enacted by the authority aforesaid, that from and after the said four and twentieth day of June no contract for the sale of any goods, wares, and merchandises for the price of ten pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

9 GEO. IV., CAP. 14.

AN ACT for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements.

[9th May, 1828.]

Representa-
tions of
character.

VI. And be it further enacted, that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation of assurance be made in writing, signed by the party to be charged therewith.

29 Car. 2, c. 3.

VII. And whereas by an Act passed in England in the twenty-ninth year of the reign of King Charles the Second, intituled An Act for the Prevention of Frauds and Perjuries, it is, among other things, enacted, that from and after twenty-fourth day of June, one thousand six hundred and seventy-seven, no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be

allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized : And whereas a similar enactment is contained in an Act passed in Ireland in the seventh year of the reign of King William the Third : And whereas it has been held, that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied ; and it is expedient to extend the said enactments to such executory contracts : Be it enacted, That the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some Act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

*Irish Act,
7 Will. 3, c. 12.*

*Powers of
recited Acts
extended to
contracts for
goods of 10l.
or upwards,
although the
delivery be
not made.*

1 WILL. IV., CAP. 68.

AN ACT for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for Hire, against the Loss of or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof.

[23rd July, 1830.]

WHEREAS by reason of the frequent practice of bankers and others of sending by the public mails, stage coaches, waggons, vans, and other public conveyances by land for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage coach proprietors, and common carriers for hire is greatly increased : And whereas through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage coach proprietors, and other common carriers, by due diligence, to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have

Mail contractors, coach proprietors, and carriers not to be liable for loss of certain goods above the value of 10*l*. unless delivered as such, and increased charge accepted.

thereby sustained heavy losses : Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this Act no mail contractor, stage coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the descriptions following ; (that is to say,) gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured and unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds unless at the time of the delivery thereof at the office, warehouse, or receiving house of such mail contractor, stage coach proprietor or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

When any parcel shall be so delivered an increased rate of charge may be demanded.

Notice of the same to be affixed in offices or warehouses.

II. And be it further enacted, that when any parcel or package containing any of the articles above specified shall be so delivered, and its value and contents declared as aforesaid, and such value shall exceed the sum of ten pounds, it shall be lawful for such mail contractors, stage coach proprietors, and other common carriers to demand and receive an increased rate of charge, to be notified by some notice affixed in legible characters in some public and conspicuous part of the office, warehouse, or other receiving house where such parcels or packages are received by them for the purpose of conveyance, stating the increased rates of charge required to be paid over and above the ordinary rate of carriage as a compensation for the greater risk and care to be taken for the safe conveyance of such valuable articles ; and all persons sending or delivering parcels or packages containing such valuable articles as aforesaid at such office shall be bound by such notice, without further proof of the same having come to their knowledge.

III. Provided always, and be it further enacted, that when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted as hereinbefore mentioned, the person receiving such increased rate of charge or accepting such agreement shall, if thereto required, sign a receipt for the package or parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the mail contractor, stage coach proprietor, or other common carrier as aforesaid shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.

Carriers to give receipts, acknowledging increased rate.

In case of neglect to give receipt or affix notice, the party not to be entitled to benefit of this Act.

IV. Provided always, and be it enacted, that from and after the first day of September now next ensuing no public notice or declaration heretofore made or hereafter to be made shall be deemed or construed to limit or in anywise affect the liability at common law of any such mail contractors, stage coach proprietors, or other public common carriers as aforesaid for or in respect of any articles or goods to be carried and conveyed by them; but that all and every such mail contractors, stage coach proprietors, and other common carriers as aforesaid shall from and after the said first day of September be liable, as at the common law, to answer for the loss of any injury to any articles and goods in respect whereof they may not be entitled to the benefit of this Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability notwithstanding.

Publication of notices not to limit the liability of proprietors, &c., in respect of any other goods conveyed.

V. And be it further enacted, that for the purposes of this Act every office, warehouse, or receiving house which shall be used or appointed by any mail contractor or stage coach proprietor or other such common carrier as aforesaid for the receiving of parcels to be conveyed as aforesaid, shall be deemed and taken to be the receiving house, warehouse, or office of such mail contractor, stage coach proprietor, or other common carrier; and that any one or more of such mail contractors, stage coach proprietors, or common carrier shall be liable to be sued by his, her, or their name or names only; and that no action or suit commenced to recover damages for loss or injury to any parcel, package, or person shall abate for the want of joining any co-proprietor or co-partner in such mail, stage coach, or other public conveyance by land for hire as aforesaid.

Every office used to be deemed a receiving house;

and any one coach proprietor or carrier shall be liable to be sued.

VI. Provided always, and be it further enacted, that nothing in this Act contained shall extend or be construed to annul or in anywise affect any special contract between such mail contractor, stage coach proprietor, or common carrier, and any other parties for the conveyance of goods and merchandizes.

Not to affect contracts.

Parties entitled to damages for loss may also recover back extra charges.

VII. Provided also, and be it further enacted, that where any parcel or package shall have been delivered at any such office, and the value and contents declared as aforesaid, and the increased rate of charges been paid, and such parcels and packages shall have been lost or damaged, the party entitled to recover damages in respect of such loss or damage shall also be entitled to recover back such increased charges so paid as aforesaid, in addition to the value of such parcel or package.

Nothing herein to protect felonious acts.

VIII. Provided also, and be it further enacted, that nothing in this Act shall be deemed to protect any mail contractor, stage coach proprietor, or other common carrier for hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his or their employ, nor to protect any such coachman, guard, book-keeper, or other servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

2 & 3 WILL. 4, CAP. 71.

AN ACT for shortening the Time of Prescription in certain Cases.
[8th August, 1832.]

WHEREAS the expression "time immemorial, or time whereof the memory of man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be

Claims to right of common and other profits *à prendre*, not to be defeated after thirty years' enjoyment by showing the commencement:

defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

after sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

II. And be it further enacted, that no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon over or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

In claims of right of way or other easement the periods to be twenty years and forty years.

- III. And be it further enacted, that when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Claim to the use of light enjoyed for 20 years indefeasible, unless shown to have been by consent.

IV. And be it further enacted, that each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

Before-mentioned periods to be deemed those next before suits for claim to which such periods relate.

8 & 9 VICT. CAP. 106.

AN ACT to amend the Law of Real Property. [4th August, 1855.]

Feoffments,
partitions,
exchanges,
leases, assign-
ments, and
surrenders
required
(subject to
certain ex-
ceptions) to
be by deed.

III. That a feoffment, made after the said first day of October, one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed; and that a partition, and an exchange, of any tenements or hereditaments, not being copyhold, and a lease, required by law to be in writing, of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, and a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed: Provided always, that the said enactment so far as the same relates to a release or a surrender shall not extend to Ireland.

When the
reversion on
a lease is
gone the
next estate
to be deemed
the reversion.

IX. That when the reversion expectant on a lease, made either before or after the passing of this Act, of any tenements or hereditaments, of any tenure, shall, after the said first day of October, one thousand eight hundred and forty-five, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

17 & 18 VICT. CAP. 31.

AN ACT for the better Regulation of the Traffic on Railways and Canals.

[10th July, 1854.]

Company
to be liable
for neglect
or default
in the carriage
of goods, not-
withstanding
notice to
the contrary.

VII. Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein

contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable: Provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals, beyond the sums hereinafter mentioned; (that is to say,) for any horse, fifty pounds; for any neat cattle, per head, fifteen pounds for any sheep or pigs, per head, two pounds; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable per-centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per-centage or increased rate of charge shall be notified in the manner prescribed in the statute Eleventh George Fourth and First William Fourth, chapter sixty-eight, and shall be binding upon such company in the manner therein mentioned; Provided also, that the proof of the value of such animals, articles, goods, and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or injury: Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage: Provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said Act of the Eleventh George Fourth and First William Fourth, chapter sixty-eight, with respect to articles of the descriptions mentioned in the said Act.

Company not to be liable beyond a limited amount in certain cases, unless the value declared and extra payment made.

Proof of value to be on the person claiming compensation. No special contract to be binding unless signed.

Saving of Carriers Act, 11 Geo. 4, and 1 Will. 4, c. 68

19 & 20 VICT. CAP. 97.

AN ACT to amend the Laws of England and Ireland affecting Trade and Commerce.

[29th July, 1856.]

III. No special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith or some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document.

Consideration for guarantee need not appear by writing.

26 & 27 VICT. CAP. 41.

AN ACT to amend the Law respecting the Liability of Innkeepers, and to prevent certain Frauds upon them.

[13th July, 1863.]

WHEREAS it is expedient to amend the law concerning the liability of innkeepers in respect of the goods of their guests in manner hereinafter mentioned: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows; (that is to say),

Innkeeper not to be liable for loss, &c., beyond £30, except in certain cases.

I. No innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any carriage, to a greater amount than the sum of thirty pounds, except in the following cases; (that is to say),

- (1.) Where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ:
- (2.) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper:

Provided always, that in the case of such deposit it shall be lawful for such innkeeper, if he think fit, to require as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same.

Obligation to receive property of guests for safe custody.

II. If any innkeeper shall refuse to receive for safe custody, as before mentioned, any goods or property of his guest, or if any such guest shall, through any default of such innkeeper, be unable to deposit such goods or property as aforesaid, such innkeeper shall not be entitled to the benefit of this Act in respect of such goods or property.

Notice of law, &c., to be conspicuously exhibited.

III. Every innkeeper shall cause at least one copy of the first section of this Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he shall be entitled to the benefit of this Act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited.

Interpretation of terms.

IV. The words and expressions hereinafter contained, which in their ordinary signification have a more confined or a different meaning, shall

in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows ; that is to say, the word "inn" shall mean any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests ; and the word "inn-keeper" shall mean the keeper of any such place.

28 & 29 VICT. CAP. 86.

AN ACT to amend the Law of Partnership.

[5th July, 1865.]

WHEREAS it is expedient to amend the law relating to partnership : Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows :

I. The advance of money by way of loan to a person engaged or about to engage in any trade or undertaking upon a contract in writing with such person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such.

The advance of money on contract to receive a share of profits not to constitute the lender a partner.

II. No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

The remuneration of agents, &c., by share of profits not to make them partners.

III. No person being the widow or child of the deceased partner of a trader, and receiving by way of annuity a portion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of or to be subject to any liabilities incurred by such trader.

Certain annuitants not to be deemed partners.

IV. No person receiving by way of annuity or otherwise a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of or be subject to the liabilities of the person carrying on such business.

Receipt of profits in consideration of sale of goodwill not to make the seller a partner.

In case of
bankruptcy, &c.,
lender not to
rank with other
creditors.

V. In the event of any such trader as aforesaid being adjudged a bankrupt, or taking the benefit of any Act for the relief of insolvent debtors, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan, nor shall any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid until the claims of the other creditors of the said trader for valuable consideration in money or money's worth have been satisfied.

Interpretation
of "person."

VI. In the construction of this Act the word "person" shall include a partnership firm, a joint stock company, and a corporation.

INDEX OF EXAMPLES.

	PAGE
Abuse, mere, not actionable	246
Agent, when wife may be	130
Agreement for sale of goods	57
Annoyance amounting to a nuisance	203
Authority, when implied by custom, 1, 2, 3	119
 Bailment	 82
Bill of Exchange	138
 Carrier, to whom liable	 90
Commodatum	82
Condition precedent, in case of sales	70
Conditional sale of goods... ..	56
Contract, executed	17
executory	17
implied	17
in restraint of marriage	127
misjoinder of parties	10
opposed to public policy	31
simple	22
Contribution to lawful game	33
Contributory negligence, 1, 2, 3, 4, 5, 6... ..	221
Covenants, dependent	158
independent	158
to repair, tenant's liability under	161
Custom of merchants	2
Customs, particular or local	2
 Damages, general, in contract, 1, 2, 3, 4, 5, 6	 290
in tort, 1, 2, 3, 4, 5	291

	PAGE
Dependent covenant	158
Deposition	82
Distress, wrongful	214
Dominant tenement	175
Estoppel in pais	166
Executed contract... ..	17
Executory contract	17
Fixtures, tenants'	195
Forfeiture of lease	167
waiver of	167
Guarantie, what	95
Illegal consideration	32, 33
Illegal distress	214
Implied contract	17
Independent covenants	158
Land, sale of an interest in	41
Lex non scripta	1
Locatio operis faciendi	83
Mandatum	82
Marriage, contracts in restraint of	127
Merger of contract of specialty in contract of record	19
simple contract in contract of specialty	20
lease... ..	167
Misjoinder of parties to a contract... ..	10
Mutuum	83
Negligence, what	220
contributory, what	221
Negligent personal conduct	260
use of real property	208
use of chattels	220

	PAGE
Notice to quit	155
Nuisance, public, when actionable...	206
Particular customs	2
Privity, what	21
Promise, a bare, not under seal, void	37
implied, where consideration executed, with previous request	24
not implied, where consideration executed with previous request	24
Promissory note	141
Public nuisance, when actionable...	206
Public policy, contracts opposed to	31
Quit, notice to	155
Request when implied	25
Sale of Goods, agreement for	57
conditional	56
Servient tenement...	175
Servitude	175
Slander, when actionable	247
Specific performance, when granted	35
Surrender by estoppel	166
Taskwork, contract of	77
Tenancy at will, how impliedly terminated	156
Tenancy on sufferance, what	156
Tenants fixtures	195
Torts founded on contract	51
Trademark which has become <i>publici juris</i>	267
Usage	1
Vituperation, mere, not actionable...	246
Waiver of forfeiture of lease	167
Warranty	66
Written contract defeating the Prescription Act ...	48

INDEX OF ILLUSTRATIVE CASES.

	PAGE
Abandonment of servitude	192
Abatement of nuisance	200
Acceptance of contract , actual, 1, 2	43
constructive, 1, 2	44
Accord and satisfaction	28
Actual receipt , constructive	44
Admission defeating the Statute of Limitations —	
conditional promise becoming absolute	16
when insufficient	16
Agent , cannot dispute his principal's title	110
exceeding his authority	110
fraudulent ; when he cannot bind his principal	72
having an interest may sue	120
liability of, where there is no principal	121
liability of, for representing that he had authority... ..	121
not liable when agency notorious	123
receipt by, is receipt of principal	123
receiving money for third party	123
rights of, against principal	109
signing contract in his own name, 1	122
" " " 2	122
where principal is undisclosed, may sue	120
Alteration of Negotiable instruments	150
Agreement for sale of goods	57
Apparent possession under Bills of Sale Act	64
Apprentice , permanent illness of	76
Appropriation , on sale of goods, what	58

	PAGE
Authority , express, includes implied	117
implied by conduct of principal	118
implied by course of dealing	117
of agent notoriously limited	119
of woman living as wife to pledge credit of apparent husband	130
Bailee , duty of, in case of <i>locatio operis faciendi</i>	86
duty of, in case of <i>locatio rei</i>	86
Bailor , duty of, in case of <i>locatio rei</i>	85
Bill of Exchange , onus of proof that value has been given for, in what case lies on holder	144
Brokerage , marriage, contracts of are void	127
Carrier , liability of, at end of transit	94
liability of, inherent vice in the thing bailed	87
when not liable for passengers' personal luggage... ..	91
Caveat emptor , 1, 2	69, 70
Condition precedent in case of sale, express	71
implied	71
Consideration , 1, 2	22, 23
expressed in a written memorandum	47
immoral	31
Contract , executed, when promise supported by previous request	23
in restraint of trade, 1, 2	32
of record acts as an estoppel	19
of task work or of sale, distinction between	78
under duress	30
voidable through fraud, election to hold it void	30
Contribution to lawful game, what	34
Contributory negligence , when not a defence, 1, 2, 3... ..	221, 222, 223
Conversion , 1, 2, 3, 4.	211, 212
act of, cannot be purged	212
Corporation , contract by, not under seal, when valid, 1, 2, 3, 4, 5... ..	38, 39, 40

	PAGE
Covenant entered into with agent	111
not discharged by written license	27
personal	159
Cruelty justifying wife in leaving husband...	136
Custom to go upon the land of another	191
to take a profit in the land, when it can vest in a class	191
 Damage feasant, when things may not be taken...	 201
Damage , exemplary... ..	289
when in the contemplation of the parties, 1, 2,	
3, 4	296, 297, 298
liquidated... ..	302
remoteness of, 1, 2, 3, 4, 5, 6, 7, 8	296, 297, 298,
	299, 300
special, 1, 2, 3, 4, 5, 6	292, 293, 294, 295
Damnum sine injuria	3, 50
Dangerous premises , liability of owner of, to persons on	
lawful business	204
liability of owner of, to a bare licensee	205
Dangerous thing kept at owner's peril	202
Delivery of goods	59
Detinue founded on tort	6
Discharge of contracts under seal after breach, when	
possible, by accord and satisfaction	27
before breach, by deed	27
Dismissal of servant , reasons for, 1, 2, 3	75
Duress , contracts made under	30
 Election to hold contract void by reason of fraud ...	 30
Equitable waste	195
Estoppel by contract of record	19
Evidence , <i>see</i> "PAROL EVIDENCE."	
Executed contract within Statute of Frauds, need not be	
in writing	42
 False representation not fraudulent	 72

	PAGE
Father , right of, to custody of infant child	283
when the court will interfere with the right of ...	284
Faults , sale with all	73
Finder of Chattel has good title against all but the true owner	213
Forfeiture of conditional servitude... ..	193
of lease, waiver of	167
Forgery of negotiable instruments	151
Fraud , optional to hold void contract induced by	30
Fraudulent agent , signature of, when it will not bind principal	263
Fraudulent misrepresentation at sale	72
liability of one who makes, though not personally interested	261
Fraudulent misrepresentation may be partly verbal under Lord Tenterden's Act	262
may be made by conduct	264
not made directly	264
of third party to induce a marriage	127
when made to the public	264
Furnished house , warranty that it is habitable	162
Gaming contract , recovery of deposit from stakeholders	33
Grant of servitude implied, 1, 2, 3, 4, 5	182, 183, 184, 185
lost, essentials to claim under 1, 2, 3, 4, 5 ...	185,
186, 187, 188	
lost, evidence in rebuttal of	189
more than a license	182
Guarantie , essentials of, 1, 2, 3	95, 96
rights and liabilities of the sureties, 1, 2, 3, 4.	98, 99, 100
when may be revoked	98
when surety discharged, 1, 2, 3	96, 97, 98
Hiring for a year	74
Husband , misconduct of, justifying his wife's leaving him	136
Illness , permanent, of apprentice	76
Immoral conduct of servant, ground for dismissal ...	75
Immoral consideration avoiding a contract	31

	PAGE
Implied grants of servitudes, 1, 2, 3, 4, 5	182, 183, 184, 185
Indemnification of agent by principal	109
Infirmity of title to bill of exchange, implied notice of ...	145
Inherent vice in thing bailed	87
Injunction to restrain breach of contract	36
Injuria sine damno	3
Injury to child of tender years—master and servant ...	283
Innkeeper , liability of, under Innkeepers Act	88
 Land , sale of an interest in, what	 41
License not a grant	182
Licensee , liability of owner of dangerous premises to ...	205
Lien , vendor's right of, revived by insolvency of vendee, 1, 2, 3	60, 61
Limitation, Statute of , how defeated	16
Liquidated damages	302
Locatio operis faciendi , duty of bailee in case of ...	86
Locatio rei , duty of bailee in case of	86
bailor ,,	85
Luggage , personal, of passenger in railway carriage ...	91
 Malice , what	 243
in fact destroys privilege	249
Mandamus for breach of contract	36
Market overt , sale of goods in	53
Marriage , brokerage contract respecting	127
not part performance of contract under Statute of Frauds	128
Master , has a right of action for enticing away his servant	281
has a right of action for torts committed against his servant, 1, 2	281, 282
when he may dismiss servant without notice, 1, 2, 3	75
when liable for injuries to servant in course of his employment, 1, 2, 3	277, 278
when not liable for injuries to servant in course of his employment, 1, 2, 3	278, 279

MASTER—*continued*.

PAGE

when liable for torts committed by servant, 1, 2,	
3, 4, 5	272, 273, 274
Material terms in written contract, 1, 2, 3 ...	46, 47
Memorandum in writing , essentials to a valid, under	
Statute of Frauds, 1, 2, 3, 4, 5, 6	46, 47, 48
Memorandum in writing , several documents may con-	
stitute	48
Misrepresentation , fraudulent	72
not fraudulent does not avoid sale... ..	72
Mistake , when contract will be avoided on account of ...	31
 Names of parties in memorandum in writing	46
Natural servitudes , 1, 2, 3, 4	176, 177
Necessity , way of	183
Negligence by bailee in cases of <i>locatio operis faciendi</i> ,	
1, 2, 3	86, 88, 91
by bailee in cases of <i>locatio rei</i>	86
by bailor „ „	85
of drawer of negotiable instrument	151
Negotiable instrument , immaterial alteration in ...	150
Notice of action	242
of infirmity of title to negotiable instrument ...	145
of termination of yearly hiring	74
Nuisance , abatement of	200
examples of, 1, 2, 3, 4, 5, 6	203, 204
what is no defence to an action for, 1, 2, 3 ...	207
 Operation of law , surrender by, 1, 2	164, 165
Original doer of wrongful act is responsible	300
even when the wrongful interference of third party	
has caused the mischief	301
 Parol agreement for a lease , when specific performance	
of, granted	157
Parol evidence may be given to charge a new party on a	
written contract	116

PAROL EVIDENCE— <i>continued</i> .	PAGE
may not be given to discharge an apparent party to a written contract	116
Part performance of a contract under Statute of Frauds, marriage is not	128
Penalties , 1, 2	304, 305
Personal covenant	159
Personal luggage , liability of railway company for ...	91
Presumption of lost grant may be rebutted	189
of wife's authority to pledge husband's credit may be rebutted, 1, 2, 3, 4	131, 133, 134
of wife's authority to pledge husband's credit, when irrebuttable	135
Price	47
Principal , when may revoke his authority to agent, 1, 2 ...	107, 108
when he must indemnify his agent	109
Privileged occasions , 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 ...	250,
251, 252, 253, 254, 255, 256	
Promise binding when consideration is executed and there is a previous request	23
implied, only co-extensive with the consideration...	24
Property in goods when retained after appropriation on an agreement for sale	59
Quantum meruit , 1, 2, 3, 4, 5, 6	79, 80, 81
Railway Company forwarding goods by other lines ...	93
Ratification by principal of agent's contract, 1, 2 ...	113, 115
Reasonable cause	244
Receipt , constructive actual, 1, 2	44, 45
Religion of child , ante-nuptial agreement by father as to, void	286
Representation , false	72
fraudulent	72
Request , where implied, 1, 2	25, 26
Sale of goods , agreement for	57, 58
in market overt, title to	53

SALE OF GOODS— <i>continued</i> .	PAGE
not in market overt, title to, 1, 2	54
conditional, 1, 2	56, 57
unconditional, what constitutes	56
with all faults	73
Sample , sale by, warranty under	69
Servant of tender years, injury to	283
Servitude , abandonment of	192
forfeiture of, conditional	193
natural, 1, 2, 3, 4	176, 177
Signature of party to be charged on written contract ...	47
Slander , when actionable, 1, 2, 3	246, 247
Special contract uncompleted , 1, 2, 3, 4, 5, 6... ..	79, 80, 81
Specific performance of parol agreement for lease ...	157
when granted	35
Stoppage in transitu	61
Sub-agent , to whom liable	109
Sub-contractor , negligence of, when employer liable	
for, 1, 2, 3	275, 276
Surety may revoke guarantie	98
rights and duties of, 1, 2, 3, 4	98, 99, 100
when discharged, 1, 2, 3	96, 97, 98
Surrender by operation of law, 1, 2	164, 165
Task-work , contract of	78
Tenancy for less than a year , how implied	155
Tenant in possession under a void lease, for what liable ...	153
Title to goods not purchased in market overt, 1, 2 ...	54
purchased in market overt	53
Trade , contracts in restraint of, 1, 2	32
Trademark	266
Trespass ab initio	199
Trespass , distinguished from conversion	210
to land justifiable, if to abate a nuisance	200
Unconditional sale	56
Underlease , not affected by surrender of lease	166

	PAGE
Undisclosed principal , bound by the equities which are	
binding on his agent	113
liabilities of, 1, 2, 3, 4	114, 115
may repudiate or adopt a contract made by his	
agent without his authority	113
when he may take the benefit of a contract made	
by his agent	112
Unskilful work	78
Value given for bill of exchange ; when burthen of proof lies	
on the holder	144
Void lease , liability of tenant in possession under... ..	153
Volunteer , in same position as fellow-servant	280
Waiver of forfeiture of lease	167
Warranty , express, what	66
implied, of title, 1, 2	67
implied, of quality, 1, 2, 3, 4	68, 69
implied, on sale by sample... ..	69
Waste , equitable	195
Way of necessity	183
Wife , when she has authority to pledge her husband's credit,	
1, 2, 3, 4, 5, 6... ..	130, 131, 133, 134, 135
authority may be countermanded without notice to	
tradesman, 1, 2	131, 134
cruelty to, by husband, justifying refusal to live	
with him	136
Wilful disobedience to orders by servant... ..	75
Witness , privileged	255
Work , unskilful	78
Written discharge of covenant before breach, effect of	27
Year , contract not to be completed within a	42
Yearly hiring , termination of	74
Yearly tenancy , how implied	154

GENERAL INDEX.

	PAGE
Abandonment , notice of, in case of constructive total loss	103
of servitude 	192
Acceptance of goods, what 	43
of bill of exchange, 	146
presentment for 	145
waiver of 	147
for honour: or <i>supra protest</i> ...	149
Acceptor , what 	137
Access of mother to child, the Court will grant 	285
Accidental fire	208
Accord and satisfaction , what 	28
Account stated	141
Acknowledgment of a deed by a married woman 	129
of a debt, which will bar the statute of limitations...	15
Actions , forms of 	5
Actual receipt of goods 	44
Agent , what	107
rights and liabilities of 	107, 120
when wife can bind her husband as 	130
when signature of fraudulent, binds principal 	263
Agreement for a sale 	57
as to religion of child by father, when void 	286
Agricultural Holdings Act , notice to quit under 	164
tenant's fixtures under 	197
Alteration of bills and notes 	150
Apologies , as defences, in cases of defamation 	257
Apparent possession	63
Apprenticeship , contract of 	76
how terminated 	76
powers of Courts of Summary Jurisdiction as to ...	77

	PAGE
Appropriation of goods on contract for sale	58
reservation of property in goods after	59
Arrest , when justifiable	230
Assignee of lease may sue lessor and his assignees ...	11
liability of, on covenants in lease ...	159
may be sued by reversioner thereon ...	11
of life and marine policies may sue on them ...	11
Assignment of debt	12
of right of action	10
of policies, marine	102
fire	104
life	106
Assignor of lease, rights and liabilities of	160
Assumpsit , what	6
Authority to agent, express	116
implied	117
to wife to pledge her husband's credit	130
Average , general	103
particular	104
Avowry , what	219
Bailments , what	82
different kinds of	82
duties and liabilities of bailor and bailee in different cases	83
Bailee , negligence of... ..	227
Bank note , what	141
Barratry , what	101
Battery , what	229
when justifiable	229
Bets cannot be recovered	33
Bill of exchange , what	137
alteration of	150
characteristics of	140
forgery of	151
parties to	137
their liabilities under	140

BILL OF EXCHANGE— <i>continued</i> .						PAGE
presentment of, for acceptance	...	...	...	...	...	145
payment	...	...	...	...	...	147
suspension of, <i>see</i> "RENEWAL."						
Bills of lading	...	...	...	...	...	151
Bills of sale, when void	...	...	...	...	...	63
Breach of contract, remedies for	...	...	...	...	...	35
Brokerage, marriage	...	...	...	...	...	127
Calls on shares	...	...	...	...	...	20
Carriers Act...	...	...	...	...	...	91
Carriers, who are	...	...	...	...	...	88
by land	...	...	...	...	...	88
by water	...	...	...	...	...	92
by land and water	...	...	...	...	...	93
restrictive legislation as to	...	...	...	...	...	89
rights and liabilities of	...	...	...	...	...	90
liable as insurers	...	...	...	...	...	87
Case, action on the, what	...	...	...	...	...	7
Cattlegates and cowgrasses	...	...	...	...	...	181
Caveat emptor	...	...	...	...	...	69
Champerty, what	...	...	...	...	...	32
Cheque on a banker, what	...	...	...	...	...	141
crossed	...	...	...	...	...	142
how it differs from a bill of exchange	...	...	...	...	...	141
liabilities of bankers on	...	...	...	...	...	142
Children, parents' dominion over	...	...	...	...	...	283
Class, a, may claim an easement by custom	...	...	...	...	...	190
may not claim a profit <i>à prendre</i>	...	...	...	...	...	191
exception	...	...	...	...	...	191
Coals, sale of, by measure	...	...	...	...	...	32
Cognizance, what	...	...	...	...	...	219
Commodatum, what	...	...	...	...	...	82
Common, rights of	...	...	...	...	...	179, 192
appendent	...	...	...	...	...	179
appurtenant	...	...	...	...	...	180
in gross	...	...	...	...	...	181
Common employment, what	...	...	...	...	...	279

	PAGE
Common law , what	1
Companies being wound up, their choses in action assign- able	11
Condition precedent , sale of goods on, what	70
express ...	70
implied ...	71
Conditional Sale	56
Consideration for bills of exchange	143
when must be proved	143
illegal	32
immoral	31
in a written contract	46
Constable , when may arrest without a warrant	237
Constructive total loss	103
Contracts by and with corporations	38
discharge of	27
generally	17
how vitiated	130
opposed to public policy	31
of apprenticeship	76
of hiring and service	74
of task work	77
requisites of simple	21
special, uncompleted	78
when assignable	10, 11, 12
which must be under seal	37
in writing	41
exceptions	42
who can sue and are liable upon	8, 9, 10
Conventional servitudes	178
how claimable	182
how extinguished	192
Conversion , what is	210
act of, cannot be purged	212
Corporations may sue and be sued	10
how contracts by and with are authenticated	38

	PAGE
Costs , agreement as to, between solicitor and client ...	49
of defending an action, when recoverable as special damage	295
Covenant , action on, what	5
Covenants , dependent	157
lessee's, commonly inserted in leases	160
independent	158
personal	159
real	158
running with the land	158
to repair	161
usual ; what are	157
Criminal information	258
Criminal proceedings in cases of defamation	258
Crossed cheques	142
Cruelty of husband justifying his wife's leaving him ...	136
Custody of children	283
Customs , general	1
of London as to married women	9
of merchants	2
particular or local	2
essentials of	2
to go on the land of another	190
Damage , what	3
Damage feasant	200
remedies in cases of trespass	200
Damages	289
actual	290
exemplary	289
general	290
liquidated	302
prospective	295
special	292
Damnum sine injuria	3
Days of grace	147

	PAGE
Death , injuries resulting in	223
liability of shipowners for ...	224
Debt , action in, what	5
Dedication of right of way to the public	178
Deed , what	37
Defamation of character	246
questions for the jury in cases of	257
judge in cases of	258
Del credere agent , what	107
Delivery of goods	59
Demise , what	153
Depositum , what	82
Determination of tenancy	163
Detinue , what	6
founded on tort	6
Devise , servitude may be created by	182
Dice illegal	34
Discharge of contracts , specialty	27
simple	28
Disclaimer of lease	168
by trustee in bankruptcy	169
Dishonour , notice of	149
Disability , persons under	15
Distrainor , duties of in case of animals damage feasant ...	201
Distress , what	169
proceedings in	169
removal of goods to evade	170
what goods privileged from	216
wrongful	214
remedies for	217
Divorce court , jurisdiction over children of divorced	
parents	285
Duress , its effect on contracts made under	30
Easements	178
essentials of... ..	179

	PAGE
Ejectment at common law	171
under Common Law Procedure Act, 1852 ...	171
County Court Act, 1867	173
Emblements	162
Enticing away servant	281
Equitable waste	195
Equities binding on agent are binding on undisclosed principal	112
Escrow , what	37
Estoppel , contract of record acts as	19
specialty acts as	20
Estoppel in pais	165
Estoppel , surrender by	164
Estovers	180
Evidence , parol, admissible to charge a person not a party to a contract	115
Exchanges of land , what	37
Executed contract with corporation need not be under seal	40
Exemplary damages	289
Executors and administrators , rights of action by ...	11
Explosives Act, 1875	90
 Factors Acts	 55
sale of goods by factors under	55
False imprisonment	230
Father , religion of, child must be brought up in ...	286
right of dominion over children	283
Felony , tort amounting to a	51
Feoffment , what	37
Finder of chattel	213
Fines and Recoveries Act	129
Fire policy	104
Fire , negligent and accidental	208
Fixtures	195
right of removal of	197

	PAGE
Forcible entry	171
Forfeiture of conditional servitude	193
of lease	167
waiver of	167
where relieved against	168
Forgery of negotiable instruments	151
Forms of action	5
when abolished	5
classification of	5
Fraud, how it vitiates a contract	30
of agent, when principal is bound by it	116
Frauds, Statute of, contracts within	41
marriage not a part performance within	128
Fraudulent sale of goods	63
representation as to marriage	127
by agent	263
sale of goods on a	71
to the public	264
what is a	72
Furnished house, lessor's implied warranty as to	162
 Gamedealer must be licensed	 32
Games, unlawful, what are	34
Gaming, contracts by way of, void	33
debt, securities given for	34
General damages	290
Grace, days of	147
Grant of servitudes, express...	182
implied	182
lost	185
essentials of	185
Guaranties	95
essentials of... ..	95
must be in writing	41, 95
Guardian, testamentary	286

	PAGE
Hiring , contract of	74
annual	74
how terminable	74
Holder of negotiable instrument for value	144
Holding over , when lessee is liable for double rent ...	169
Hundred , the, is liable for damage done by rioters ...	200
Husband and wife	129
Husband , credit of, when wife has authority to pledge ...	130
may sue for wife's choses in action	11
remedy of, when his cruelty has driven his wife away from him	135
rights as to wife's property	129
when civilly dead	8
legally	9
Illegal consideration	82
Immoral consideration	81
Impounding of goods distrained	170
Imprisonment , false	230
when justifiable	230
Indemnity , contracts of	95
Infants	8
cannot ratify conduct on coming of age	8
Inherent vice in thing bailed	87
Injunction	36
Injuria sine damno	3
Injuries resulting from exercise of statutory powers ...	268
resulting in death	223
to servant of tender years	283
Inquisition in lunacy	235
Innkeepers' Act	87
duties and liabilities of	87
lien of for charges	88
Insurance , contracts of	100
fire	104
life	105
marine	101

	PAGE
Interest, when recoverable	301
Interruption of enjoyment of servitude	193
I. O. U., what	141
 Judgments	 18
Justification	248
 Land, recovery of	 171
under County Courts Act, 1856	172
at petty sessions	173
sale of an interest in	41
trespass to	199
when excused	199
Landlord and Tenant	153
Lease, memorandum of agreement for a, what are material terms in	156
what... ..	153
when must be by deed	38
Lessee, covenants by	160
implied obligations of	163
liabilities of, on covenants in lease... ..	160
Lessor, implied obligations of	162
may sue lessee's assignee on covenants	10
Lex mercatoria	2
Lex non scripta	1
Lex scripta	1
Libel	247
criminal proceedings for	258
defences to action for	248
License does not amount to a covenant	182
Lien, carrier's, for freight	90
innkeeper's right of, for charges	88
vendor's right of	60
when revived	60
waived	60
Light, claim of right to enjoy	178, 190

	PAGE
Life policy	105
Limitations, Statutes of	13
their operation, how interrupted	15
Liquidated damages	302
Locatio operis faciendi, what	83
Locatio rei, what	83
Lord Campbell's Act	224
Lord Tenterden's Act	262
Lord's Day Act	33
Loss of profits, when can be recovered	293, 294
Loss, constructive total	103
partial	103
total	103
Lost grant	185
presumption of may be rebutted	189
Lotteries, illegal	34
Luggage, passengers'	91
Lunacy Acts, proceedings under	235
Maintenance, what... ..	31
Malice in fact, what	243
in law, what	249
Malicious conspiracy	245
Malicious prosecution	243
Mandamus	35
Mandatum, what	82
Market overt, what	53
sale of goods in	53
not in	54
Marriage, breach of promise of	128
brokerage, contracts of	127
contracts in consideration of	41, 128
restraint of	127
Married women sole traders by the custom of London	9
when they cannot become bankrupt	9
sue	8
when they can sue	8

	PAGE
Married Women's Property Act, 1870	9
Marine insurance	101
Master and servant, contract between	74
Master, liability of torts committed by servant in course of	
his employment	272
liability of to servant for negligence	277
right of in respect of torts committed against his	
servant... ..	281
when he may dismiss his servant without notice ...	75
Material terms of agreement for a lease	156
of memorandum in writing	46
Memorandum in writing, its essentials	46
several documents may be read together in order	
to constitute	47
signature to	47
of agreement for a lease, its material terms ...	156
Merchant Shipping Act, 1854	93
Merchant Shipping Amendment Act, 1862	93
Merger of contracts	19, 20
of lease	167
of right to a servitude	192
Mesne profits, what	173
Misdemeanor, tort amounting to	51
Mistake, contracts made under a	31
Mutuality, what	21
Mutuum, what	82
 Necessaries, wife's authority to pledge husband's credit for	 130
Necessity, way of	183
Negligence, as to evidence of	225
contributory, what	225
when no answer to action for negligence	221
contributory of bailor	87
what	220
Negligent conduct of the bailees of chattels	227
personal conduct	260

NEGLIGENT—*continued.*

PAGE

use of chattels	220
real property	208
Negotiable instruments	137
Newspapers, when privileged	252
Nominal damages	290
Notice of abandonment	103
of action when necessary	241
in cases of injuries resulting from the	
exercise of statutory powers	271
of dishonour	149
of distress	170
of infirmity in title to negotiable instrument	144
of termination of service	74
to quit	155, 163
under The Agricultural Holdings Act	164
Noting of bills of exchange	148
Nuisance, committed in excess of statutory powers	269
remedies for	206
what	202
when may be abated	200
 Officers of Justice, when justified in arresting without a	
warrant	237
Original doer of wrongful act liable	300
 Parol agreement for a lease, when specific performance	
of granted	157
Parol evidence admissible to charge a person not a party	
to a written contract	115
Parents' dominion over children	283
Parties	8
Partitions of land, what	38
Partnership	124
Amendment Act	125
how dissolved	125
Passengers' luggage	91
Patent rights—transfer of, must be by deed	38

	PAGE
Pawbrokers' Act, 1872 , special contracts under ...	49
Penalties	302
relief against, in equity	303
at common law	303
Pledge , contracts of	84
Policies of insurance —fire	104
life	105
marine	101
essentials of	101
Presentment of bill for acceptance	145
for payment... ..	147
Prescription Act	189
Price of goods where there is a written memorandum of the contract	47
Principal and agent	107
rights and liabilities of	107
when bound by the signature of fraudulent agent and surety, <i>see</i> "GUARANTEE."	263
Privileged communications	249
occasions	250
when no answer to an action for defam- mation	249
Privity	21
Profits á prendre	179
incidents to	179
lie only in grant	191
Promise , the, in contracts	23
to marry	128
Promissory note , what	140
as a continuing security	147
Prospective damages	295
Protest of foreign bills	148
Public policy , contracts opposed to	31
Publican cannot sell beer on credit	33
Quantum meruit	78
Railway and Canal Traffic Act, 1854	92

	PAGE
Railway company , forwarding goods by another line ...	93
liability of, as carriers	90, 91
when, becomes bailee for hire	94
Reasonable cause , a question of law	244
what	244
Receipt of goods , what	44
Recognisances	19
Record , contract of	18, 19
attributes of	19
Recovery of land	171
under County Court Act, 1856	172
at petty sessions	173
Reduction into possession of wife's choses in action ...	130
Registration of partnership under Companies Act, 1862...	125
Religion of child , antenuptial agreement as to, by father, void	286
Religious belief of father to be that of child	286
Remedies for breach of contract	35
Remoteness of damage	296
Renewal of bill of exchange	148
Rent , different kinds of	13, 14
remedies for non-payment of	169
six years' arrears may be distrained for	170
Repair , covenants to	161
Replevin , proceedings in	217
what	217
Replevying of distrained goods	170
Representation , false	72
fraudulent	72, 261
Request , the, in a contract	25
Reversion , what	153
Right of action , what	3
Right of possession of goods , vendee's	60
when defeasible, and how	60
Rioters , damage done by	200
Running with the land , covenants	158

	PAGE
Sale , bill of	63
of goods, agreement for	57
conditional	56
contracts relating to	53
fraudulent	63
of value of £10, contract for	42
unconditional	55
with all faults	73
Sample , sale by, implied warranty on	69
Seal , contracts which must be under	37
under, made by agents	107, 111
Seduction	282
Separate property of wife, agreements as to	49
Servants , contracts between masters and	74
domestic	74
enticing away of	281
liability of master for torts committed by	272
to, for negligence	277
master's right of action for torts committed against	281
of carrier, felony by	92
of tender years, injury to	283
powers of Courts of Summary Jurisdiction in rela- tion to	77
seduction of female	282
Servitudes	175
conventional	178
how claimable	182
extinguished	192
natural	176
Ship must be transferred by deed	38
Shipowner , liability of, as carrier	92
for personal injuries	224
Signature to memorandum in writing	47
Slander , defence to action for	248
when actionable	246
Small Tenements Act	172

	PAGE
Special contract uncompleted	78
divisible and apportionable	79
absolutely determined	80
incapable of completion	81
Special damage	292
in an action for slander	246
Specialty, contract of	17, 20
attributes of	20
Specific performance of contract	35
of parol agreement for a lease	157
Stakeholder, liabilities of	33
Stannary rights in Cornwall	192
Statutes, merchant	18
staple	18
Statutory powers, injuries resulting from the exercise of ...	268
Stoppage in transitu	61
Sub-contractor, liability of for negligence	275
Sufferance, tenancy on	156
Sunday trading illegal	33
Support, rights of	177, 178, 184
Supra protest, acceptance of bills of exchange	149
Surety, <i>see</i> "GUARANTIE."	
rights and liabilities of	96
Surrender of land, what	38
of lease	164
by operation of law	164
effect of on under lease	166
Suspension of bill of exchange	148
Taskwork, contract of, what	77
Tenancy at will	155
how terminable	156
for less than a year... ..	155
for years	153
from year to year	154
how terminable... ..	154
on sufferance	156

	PAGE
Tenant, landlord and	153
Tenterden's Act, Lord	262
Third party intervening and causing damage does not absolve original doer of wrongful act ...	301
money paid to agent for	123
Time immemorial	188
Title to goods	53
warranty of	67
exceptions	67
Torts amounting to a felony... ..	51
founded on contract	51
generally	50
who may sue and are liable for	10
Total loss, actual	103
constructive	103
Trade, contracts in restraint of	32
Trade marks	266
counterfeiting	265
Transferee of bill of lading may sue thereon	11
of promissory note may sue thereon	11
Trespass, <i>ab initio</i>	199
action of, what	7
to goods	210
to land	199
when justifiable	199
Trover, action of, what	6
Truck Acts agreements under	49
 Unconditional sale	 55
Underlease, effect on, of surrender of lease	166
Under lessee, liabilities of	160
Underwriter, liabilities of	103
may re-insure	102
what	101
Undisclosed principal, rights and liabilities of ...	112, 114
Unnamed principal, rights and liabilities of ...	112, 114

	PAGE
Unfurnished house, lessor does not warrant	163
Unsound mind, persons of, cannot sue	8
Usage, what	1
Use and Occupation	155
Usual covenants, what	157
 Vadium	 84
Vituperation, mere, not actionable... ..	246
Void lease, tenant's liability under... ..	153
Volunteer in same position as servant in a common employment	280
 Wagers	 33
Waiver of acceptance of a bill of exchange... ..	147
of notice to quit	164
Warranty of quality of goods	67
of title to goods	67
sale of goods with a, express	66
implied	66
when not implied	69
 Waste	 194
equitable	195
persons liable for	194
Way of necessity	183
private right of	178
public right of	178
Wife, authority of, to pledge husband's credit	130
cruelty to, by husband, justifying her leaving him	136
deserted by husband in position of a <i>feme sole</i>	9
funeral expenses of, husband's liability for	136
property of, husband's rights as to	129
Will, tenancy at	155
Witness, privileged	255
Work and labour, contracts of	74
Writing, when authority to agent must be in	107
contracts which must be in	41

	PAGE
Written memorandum , essentials of	46
signature to... ..	47
Wrongful distress	214
remedies for	217
Year , contracts not to be completed within... ..	42
Yearly hiring, termination of contract for	74
tenancy	154
notice to quit under	155
tenant, liability of under a void lease	153

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